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Supreme Court of the United States

OCTOBER TERM 1971

No. 71-418

ALAN D. MILLER, M. D., as Commissioner of Mental Hygiene of the State of New York, and FRANCIS J. O'NEILL, M. D., as Director of Central Islip State Hospital,

Petitioners,

and ALEXANDER THOMAS, M. D., as Director of the Psychiatric Division, Bellevue Hospital Center,

against

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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No. .....

ALAN D. MILLER, M. D., as Commissioner of Mental Hygiene of the State of New York, and FRANCIS J. O'NEILL, M. D., as Director of Central Islip State Hospital,

Petitioners,

and ALEXANDER THOMAS, M. D., as Director of the Psychiatric Division, Bellevue Hospital Center,

against

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the Commissioner of Mental Hygiene of the State of New York and the Director of Central Islip State Hospital, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated May 26, 1971, reversing a judgment of the United States District Court for the Eastern District of New York, dated November 21, 1969.

Citation to the Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported. It is annexed hereto

as Appendix A to this petition. The District Court opinion is reported at 306 F. Supp. 1158 (1969). It is annexed hereto as Appendix B to this petition.

Jurisdiction

The Judgment of the Court of Appeals was entered on May 26, 1971.

The jursidiction of this court rests on 28 U.S.C. § 1254 (1).

Questions Presented

1. Can a state mental hospital administer mild forms of treatment to a patient who objects to such treatment on religious grounds?
2. Is the doctrine of *respondeat superior* applicable so as to authorize a damage action under the Civil Rights statutes against two public officials neither of whom had anything to do with or any knowledge of the alleged unconstitutional treatment?

Constitutional Provision Involved

United States Constitution, Amendment I

> "Congress shall make no law respecting an estabment of religion, or prohibiting the free exercise thereof;"

Statement of the Case

Facts

Respondent alleges that she is a Christian Scientist. According to hospital records submitted to the courts below, respondent was initially brought from her welfare hotel room to Bellevue Hospital on May 2, 1968, by New

York City police pursuant to New York Mental Hygiene Law § 78 governing emergency admissions. The police were acting on a complaint from a psychiatrist employed by the New York City Department of Social Services who stated that respondent:

> "has been living in room for years, not washing herself, demanding food in her room, writing letters to the Mayor's office, playing radio all night and refusing medical help."

Respondent was admitted to Bellevue for emergency treatment pursuant to § 78 of the New York Mental Hygiene Law. During her stay at the city hospital, she was given medication by injection and by mouth. It is uncontroverted that at no time did Bellevue Hospital or Central Islap State Hospital, to which respondent was later transferred attempt to give her any major treatment (such as electro-shock therapy or surgery) over her objections. Indeed, it is established state policy not to ever administer any major forms of treatment without express written permission. On May 6, 1968, pursuant to statute, she was notified of her right to a hearing under § 72 of the New York Mental Hygiene Law if she, any relative or friend felt there was no need for further hospitalization and that the Mental Health Information Service of the Supreme Court of the State of New York was available for assistance (New York Mental Hygiene Law § 88).

Thereafter, on May 7, 1968, the professional staff in the city's Bellevue Hospital, having completed their examination of respondent, a "two-physician certificate" was issued pursuant to § 72 of the New York Mental Hygiene Law certifying that respondent was mentally ill and a proper subject for care and treatment in a State institution. The certificate indicates, among other things, that respondent could possibly injure herself or others and was unable to take care of herself. The preliminary diagnosis was "CSR (chronic schizophrenic)/paranoid type."

Accordingly, on May 13, 1968, respondent was transferred to Central Islip State Hospital where she was notified of her right to a hearing pursuant to § 72 of the New York Mental Hygiene Law. At Central Islip, respondent was treated for her mental illness, the most drastic form of treatment being the injection of medication. Thereafter, respondent continued to make satisfactory progress, until she was converted to voluntary status on June 18, 1968, pursuant to § 71 of the New York Mental Hygiene Law. On June 19, 1968, upon finding an absence of suicidal or homicidal tendencies, respondent was issued an honor card and she requested to remain a patient on a voluntary basis. Finally, on July 17, 1968, respondent was discharged from the hospital in her own custody, although still diagnosed as "schizophrenia; paranoid type—much improved."

It was over a year later that the instant action was commenced. On August 11, 1969, respondent commenced an action in the United States District Court for the Eastern District of New York seeking an injunction, the convening of a three-judge court, a declaratory judgment and damages under the Civil Rights Statutes. In the complaint respondent challenged two practices of the New York State Department of Mental Hygiene:

1. Respondent claimed it was unconstitutional to treat patients in state mental hospitals who had religious scruples against such treatment.

2. Respondent claimed that § 34 (9-a) of the New York Mental Hygiene Law which provides for fingerprinting and photographing of state mentally ill patients was unconstitutional.

On November 21, 1969, the District Court rendered a decision holding against respondent on both of her contentions. The Court held that the treatment of Christian Scientists in state mental hospitals did not violate the First Amendment and that the attack on § 34 (9-a) of the New York Mental Hygiene Law did not present a sub-

stantial constitutional question. Accordingly, respondent's motions for an injunction, the convening of a three-judge statutory court and for summary judgment were denied and petitioner's motion for summary judgment was granted.

On May 26, 1971, the United States Court of Appeals for the Second Circuit, in a 2 to 1 decision, reversed the determination of the District Court, and held that compelling a patient at a state mental institution to accept medication over his religious objections was a violation of his First Amendment rights. The Court then remanded the case back to the District Court for a trial on the merits.

In addition the Court of Appeals unanimously affirmed the District Court's determination that respondent's attack on Section 34(9-a) of the New York Mental Hygiene Law did not present a substantial constitutional question. Respondent has now apparently abandoned this constitutional objection.

REASONS FOR GRANTING THE WRIT

I. There is no substantial basis for finding any First Amendment violation in the treatment at the State Mental Hospital of a patient claiming religious scruples against any such treatment.

A. This Court has consistently held that limitations on the free exercise of religion are justifiable where there is a strong and compelling state interest. *Braunfeld* v. *Brown,* 366 U.S. 599 (1960); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940). The decision of the Circuit Court is a radical and unwarranted departure from such long-standing principle.

A common area of governmental limitation of religious practices has been in the area of public health and welfare.

Accordingly, this Court has not permitted the constitutional guarantee of free exercise of religion to be used as a cloak for a person with a contagious or infectious disease. *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). Neither has it permitted children to sell religious periodicals on Sundays in violation of a state statute despite protestations of denial of free exercise of religion. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). Nor has it permitted polygamy in spite of First Amendment protestations. *Reynolds* v. *United States*, 98 U.S. 145 (1878).

The instant case is yet another application of these long standing principles. As found by the District Court and by the dissenting judge in the Circuit Court, the State does have an overriding secular interest in the care and treatment of those of its citizens who are mentally ill. This is not to say that the State may unilaterally abridge the First Amendment rights of any person suffering from any kind of mental illness, as the majority decision of the Circuit Court incorrectly reads the decision of the District Court. It does mean, however, that when a patient such as plaintiff below is admitted under the emergency provisions of the New York State Mental Hygiene Law and found by State doctors after a complete examination to be "chronic schizophrenic/paranoid type" and possibly harmful to herself and to others and unable to take care of herself, it was entirely proper and indeed necessary for State physicians to administer treatment to her. Once again, it should be emphasized that the severest form of treatment administered to plaintiff below was the giving of medication by injection and by mouth.

It would be difficult to dispute the District Court's finding that in mental illness cases, "the public interest in treating and curing patients is greater than the public interest is in cases of physical illness". 306 F. Supp. at 1167. The Court went on to fully explore the distinction:

> "Most patients who are physically ill will be able to determine that they need treatment and, when in-

formed by their physicians, will be able to make a reasoned decision as to the type of treatment to which they wish to subject themselves. *But a mental patient, because of the nature of the illness, may be unable either to seek appropriate treatment or to determine what treatment to allow.* For the physically ill person where there are no dependent children or communicable diseases involved, the danger from a refusal, on religious or any other grounds, to allow a particular type of treatment may be that the patient will be seriously ill for a period or may die. Only the patient and his immediate family are likely to be aggrieved or injured as a result. *On the other hand, where the mental patient is not properly treated, the condition may progressively worsen, and the patient may become a public burden and expense.* Badly needed beds in mental hospitals may be occupied by those (few or many) who refuse treatment which competent and expert medical practitioners prescribe. Where the proposed treatment is conducive or necessary for the cure or amelioration of mental illness, the failure to provide it would be a step backward in the history of mental hygiene." (Emphasis added.) 306 F. Supp. 1167.

Clearly, there is an overriding state interest in the care and treatment of persons suffering from a mental disorder or defect. In fact, the Constitution of the State of New York, Article 17, § 4, specifically states that "the protection of the mental health of the inhabitants of the State may be provided by state and local authorities and in such manner as the Legislature may from time to time determine". This has been construed by both state and federal courts to mean that the State acts in *parens patriae* as concerns mentally ill persons. *Higgins* v. *Binns*, 205 F. 2d 650 (9th Cir.), *cert. denied* 346 U.S. 870 (1953); *United States ex rel. Eggleston* v. *Snow*, 219 F. Supp. 417 (S.D.N.Y. 1963); *People ex rel. Anonymous* v. *LaBurt*, 27

Misc. 2d 584, aff'd. 14 A.D. 2d 560 (2d Dept. 1961), *app. dismissed* 9 N.Y. 2d 794, 175 N.E. 2d 165, *cert. denied* 369 U.S. 428 (1962); *Sporza* v. *German Savings Bank,* 192 N.Y. 8, 84 N.E. 406 (1908).

Moreover, the majority decision of the Circuit Court mistakenly assumes that a person mentally ill is to be treated in the same manner as a person who is physically ill, but not *in extremis.* However, unlike a physically ill person, mentally ill patients, such as respondent are often not in a position to decide what type of treatment is best for them. In fact, they may not even realize that they are mentally ill. When such a situation arises, and a patient is found "not in a mental condition to make a decision", a hospital can proceed to treatment. Cf. *Application of President and Directors of Georgetown College, Inc.,* 331 F. 2d 1000, 1007 (D.C. Cir.) *reh. den.* 331 F. 2d 1010, *cert. den.* 377 U.S. 978 (1964).

Finally, the record reveals that the care and treatment administered to plaintiff below did achieve an important secular goal. Respondent as a result was reported "much improved," discharged from state custody and returned to normal life. Without such treatment she might still be a patient at a mental hospital incapable of caring for herself. The policy of the State of New York has enabled her to rejoin society. Few higher priorities of governmental authority exist than the promotion of the public health of its citizens.

B. The decision below, if allowed to stand, would wreak havoc with the methods of care and treatment of mentally ill citizens which are presently utilized throughout the United States today. Instead of being permitted to effectively treat the patient's mental illness, the State would be relegated to the role of a custodian and merely supply room and board for the afflicted individual. This custodial theory of the role of mental institutions was

abandoned decades ago. See *Rouse* v. *Cameron,* 373 F.2d 451, 455 (D.C. Cir. 1966) ("involuntary confinement without treatment is 'shocking' "); Breslin, Preface to McKinney's New York Mental Hygiene Law, xii-xiii (1951 ed.).

According to the decision below, the State must say "may I?" to the patient before it begins even the mildest form of treatment such as the administering of drugs by injection and by mouth, such as was done here. To require State officials to first bring any emergency admission patient before a court would be absurd. See dissenting opinion of Judge Moore, Op. p. 16a.

It is evident that a decision as to whether a person is mentally ill and whether he should be treated is a decision which is to be made by doctors in the first instance, with judicial review. See Note, 35 Brooklyn L. Rev. 187 (1969); Report of Special Committee to Study Commitment Procedures of the Bar of the City of New York, "Mental Illness and Due Process (1962). This was precisely the procedure followed here. Respondent was admitted to Bellevue Hospital on an emergency basis pursuant to § 78 of the Mental Hygiene Law. Within four days, and pursuant to statute, she was notified of her right to demand a judicial hearing under § 72 of the Mental Hygiene Law. After her transfer to Central Islip, respondent was again informed of her right to a judicial hearing. Clearly, the procedures set forth in §§ 72 and 78 of the Mental Hygiene Law provide full constitutional safeguards and, in fact, plaintiff below intentionally chose *not* to challenge the constitutionality of those procedures.

Moreover, under respondent's argument, the State would be liable whether it gave treatment to her or denied treatment. If the doctors did not administer proper treatment and her condition worsened, they were exposing themselves and the hospital to the risk of civil and criminal liability. *Anderson* v. *State,* 48 Misc. 2d 1061, 266 N.Y.S. 2d 703

(Ct. Cl. 1966), *Young* v. *State*, 32 Misc. 2d 965, 225 N.Y.S. 2d 549 (Ct. Cl. 1962), *Georgetown College, supra*. Furthermore, the State had a duty to protect the respondent from injury, to provide her with medical treatment and an opportunity for rehabilitation. *Williams* v. *State of New York*, 308 N.Y. 548, 127 N.E. 2d 545 (1955); *Anderson* v. *State, supra; Soto* v. *State*, 55 Misc. 2d 1035, 286 N.Y.S. 2d 993 (Ct. Cl. 1968); *Sporza* v. *German Savings Bank, supra*.

The District Court was correct in pointing out the absurd consequences which respondent's contentions would lead to:

> "To restore the patient to his freedom or to retain him in custody without treating him properly would be *a violation of the duty of the Department of Mental Hygiene to both that patient and the public.* Without treatment, the patient's dangerousness and disorderliness is likely to continue unabated. In the present case, where there is an indication that the plaintiff's illness had been getting progressively worse, retaining her or allowing her out of the hospital without either curing her or acting to arrest the progression of the disease would be grossly improper. Faced with a patient who had a chronic schizophrenic reaction of a paranoiac type, and who was brought into the hospital by an emergency ambulance, *the doctors had to act in accordance with their expertise in treating mental illness.* As plaintiff's condition improved, and the immediate emergency subsided, appropriate treatment was still necessary to induce the improvement in the plaintiff's condition indicated in the records. *For the doctors to have done less would have been a violation of their obligations to the people of New York to seek to cure mentally ill patients so that they will no longer be dangerous or disruptive to themselves, or to the public, and so that they will no longer occupy scarce space in public mental health institutions.*" 306 F. Supp. at 1168. (Emphasis added)

II. The Circuit Court erroneously applied the doctrine of *respondeat superior* to the State Commissioner and Hospital Director, who had no connection with the respondent's asserted grievance.

This action was predicated upon the Civil Rights Statute, 42 U.S.C. § 1983 which imposes liability upon "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws." However, it is clear that liability under these sections is personal and is to be directed *only against those particular individuals* who, acting under color of State law violated a plaintiff's constitutional rights. *Monroe* v. *Pape,* 365 U.S. 167, 187-192 (1961).

However, the only named State defendants in this case are petitioners Allen D. Miller, the Commissioner of Mental Hygiene of the State of New York and Francis J. O'Neill, Director of Central Islip State Hospital. No allegations were made in the complaint or appear in the record below to indicate that either of these public officials in any way treated respondent against her wishes or even knew that such treatment was being administered. As stated by Judge Moore dissenting below:

> "As to these three defendants, it is entirely clear that money damages are completely inappropriate since there is no showing whatever that they in any way condoned the administration of drugs to the plaintiff. It is not shown that any of them had any information whatever as to the beliefs held by Miss Winters, or for that matter the treatment being accorded to her." Op. p. 14a

In so holding these petitioners liable the court adopted a theory of vicarious liability for state officials which is contrary to the admonition in *Monroe* v. *Pape*, *id.* at 187, to the effect that Section 1983 "should be read against the background of tort liability which makes a man responsible for the natural consequences of his actions." This admonition was repeated by this Court in *Pierson* v. *Ray*, 386 U.S. 547, 556-57 (1967), where the quotation from *Monroe* v. *Pape*, was referred to with approval.

Recently in *Hernandez* v. *Noel*, 323 F.Supp. 779, 783 (D. Conn. 1970), the District Court (after citing cases) said in line with *Monroe* v. *Pape*, *supra*, that:

> "... no liability [for damages] exists unless it is alleged and proved that the officer was either present at or directed or personally cooperated in the acts relied on for liability."

See also *Brown* v. *State of Pennsylvania*, 311 F.Supp. 1176 (E.D. Pa. 1970). In addition, the New York law of torts rejects any notion of vicarious liability of public officers. *Kagen* v. *Lefkowitz*, 20 A.D. 2d 867, 249 N.Y.S. 2d 66 (1st Dept. 1964), app. dism., 14 N.Y. 2d 487, 842 (1964).

In the instant case the line between permissible civil rights action against public officials for injunction against unconstitutional action authorized under such cases as *ex parte Young*, 209 U.S. 123 (1908) and actions for damages based upon vicarious liability of superior public officials—a distinction pointed out in *Hernandez*, *supra*, has been totally obliterated. In fact, in *Dale* v. *Hahn*, —— F. 2d —— (2d Cir. 1971), the Second Circuit went so far as to uphold a complaint in an action where an incompetent sought damages under the Civil Rights Act from the Commissioner of Mental Hygiene and the director of State Mental Hospital because the court said more effective notice should have been given by the staff doctor who signed an application for the appointment of a Committee

of the incompetent, despite the fact that the present Commissioner did not even hold such office at the time of such appointment.

In effect, the Second Circuit in these typical cases is getting at the State, the employer, for money damages by holding the superiors such as Commissioners liable. Moreover, such approach is also violative of the Eleventh Amendment.

The vice of such holdings is clearly apparent apart from the doctrine of official immunity in *Barr* v. *Mateo,* 360 U.S. 564 (1959), followed also by New York in *Lombardo* v. *Stoke,* 18 N Y. 2d 394, 222 N.E. 2d 721 (1966). No court has ever gone so far as to impose vicarious liability under § 1983 as the Second Circuit has done in the instant case. As Judge Moore correctly found, there was no showing that the named defendants were aware of the plaintiff's religious beliefs or that they were in any way aware of the treatment afforded plaintiff. Op. p. 15a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Appendix "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—September Term, 1970.

(Argued October 7, 1970 Decided May 26, 1971.)

Docket No. 34521

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

—v.—

ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants-Appellees.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from order of the United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge,* granting defendants-appellees' motion for summary judgment and dismissing the complaint in an action

brought pursuant to the federal civil rights statutes, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). 306 F. Supp. 1158 (1969). Reversed and remanded.

BRUCE J. ENNIS and WILLIAM H. PRATT (New York Civil Liberties Union, New York, N. Y.), *for Plaintiff-Appellant.*

EDMUND B. HENNEFELD (J. Lee Rankin, Corporation Counsel of the City of New York, New York, N. Y., Stanley Buchsbaum, of counsel), *for Defendant-Appellee Thomas.*

JOEL H. SACHS, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), *for Defendants-Appellees Miller and O'Neill.*

SMITH, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York (Anthony J. Travia, *Judge*) granting defendants-appellees' motion for summary judgment and dismissing the complaint in an action brought pursuant to the federal civil rights statutes [42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)]. The opinion below is reported at 306 F. Supp. 1158 (1969). We reverse and remand for further proceedings as to the claim for damages resulting from the forced medication in violation of the plaintiff's right to freedom of religion under the First Amendment.

As a preliminary matter we note that jurisdiction is properly founded under 28 U.S.C. § 1343(3) since the

rights infringed are unquestionably those of "personal liberty" rather than "property." [*Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969); *Johnson* v. *Harder*, —— F.2d —— (Docket No. 35168, decided).]

Miss Miriam Winters is a 59 year-old spinster who has been supported under public assistance for over 10 years. For several years she had lived in a hotel in Brooklyn, New York and had created some difficulty there because of her constant demands that she be given a room with a private bath and because of her alleged failure to maintain a proper state of personal cleanliness.

In early 1967, she was told by her welfare case worker that she could obtain a room with a private bath with the approval of a physician or a psychiatrist. Accordingly, at her request, she was seen by Dr. Robert Reich, a psychiatric consultant to the Department of Welfare. Following this examination Miss Winters was told that she would be given a room with a private bath if she would move to the King Edward Hotel in Manhattan, which she agreed to do, and in mid-April she took up residence there. On May 2, 1968 when Miss Winters attempted to pay her rent for that month she was told by the hotel management that she could not continue to occupy the room she was in but would have to move to another room in the same hotel. This she refused to do, and as a result, the hotel management summoned the police, and she was taken by them to Bellevue Hospital where she was involuntarily admitted pursuant to section 78(1) of the New York Mental Hygiene Law.[1]

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[1] New York Mental Hygiene Law, Section 78(1):

"The Director of any hospital maintaining adequate staff and facilities for the observation, examination, care and treatment of persons alleged to be mentally ill and approved by the commissioner to receive and retain patients pursuant to this section may receive or retain therein as a patient for a period of thirty days any person alleged to be in need of immediate observation, care, or treatment."

Appendix "A"

On May 7, 1968 appellant was examined by two staff psychiatrists at Bellevue who certified her need for care pursuant to section 72(1) of the New York Mental Hygiene Law which provides for commitment for up to 60 days upon the filing of a "two physician certificate."[2]

For 10 years prior to her admission to Bellevue Miss Winters had been a practicing Christian Scientist. When she was admitted she refused to allow a doctor to take her blood pressure stating to him that she was a Christian Scientist, and the Bellevue records contain several references to this fact indicating that the hospital clearly had notice of her religious beliefs. In spite of this, however, and over her continued objections she was given medication (for the most part rather heavy doses of tranquilizers, both orally and intramuscularly) continually from the time of her admission until she was discharged on June 18, 1968. On May 13, 1968 she was transferred from Bellevue to the Central Islip State Hospital on Long Island. Again the record clearly indicates that she brought her objections to physical medication to the attention of the hospital staff, but her protests were ignored.

The primary question raised in this appeal is whether appellant's constitutional rights were violated when she was given medical treatment over her objections, which were religious in nature, and whether she is therefore entitled to relief under the federal civil rights statutes.

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[2] New York Mental Hygiene Law, Section 72(1):

"The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and suitable for care and treatment upon certificate or certificates of two examining physicians accompanied by an application for the admission of such person executed within ten days prior to such admission by . . . any public welfare officer of the town . . . or in the case of the admission of any such person to a hospital operated by the state or a political subdivision thereof, by the director of such hospital or by the director or head of any other hospital where such person may be."

Appendix "A"

It should be emphasized at the outset that appellant had never been found by any court to be "mentally incompetent," nor, so far as the record shows, were any facts alleged by the medical personnel who attended her which would justify a finding by a court of "mental incompetence." Neither did any court ever find that she was "mentally ill," although the two physicians who examined her (pursuant to section 72(1)) did state that in their opinion she was suffering from a "mental illness".

However, the law is quite clear in New York that a finding of "mental illness" even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is "incompetent" or unable adequately to manage his own affairs. Absent a specific finding of incompetence, the mental patient retains the right to sue or defend in his own name, to sell or dispose of his property, to marry, draft a will, and, in general to manage his own affairs.[3] *Sengstock* v. *Sengstock,* 4 N.Y.2d 502, 176 N.Y.S.2d 337 (1958); *Finch* v. *Goldstein,* 245 N.Y. 300 (1927).

It is clear and appellees concede that if we were dealing here with an ordinary patient suffering from a physical ailment, the hospital authorities would have no right to impose compulsory medical treatment against the patient's will and indeed, that to do so would constitute a common law assault and battery. The question then becomes at what point, if at all, does the patient suffering from a mental illness lose the rights he would otherwise enjoy in this regard.

The court below was apparently of the view that *any* patient alleged to be suffering from a mental illness of *any* kind (even those confined under the "emergency" pro-

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[3] Of course, certain prior actions of persons adjudged mentally incomptent may subsequently be found voidable once incompetency is judicially established.

visions of section 78(1) where the allegations of mental illness need not be made by a physician) loses the right to make a decision on whether or not to accept treatment. Judge Travia reasoned as follows:

> In mental cases, the public interest in treating and caring for patients is greater than the public interest in cases of physical illness. Most patients who are physically ill will be able to determine that they need treatment and, when informed by their physicians, will be able to make a reasoned decision as to the type of treatment to which they wish to subject themselves. But a mental patient, because of the nature of his illness, may be unable either to seek appropriate treatment or to determine what treatment to allow. For the physically ill person, where there are no dependent children or communicable diseases involved, the danger from a refusal on religious or any other grounds to allow a particular type of treatment may be that the patient will die. Only the patient and his immediate family are likely to be aggrieved or injured as a result. On the other hand, where the mental patient is not properly treated, the condition may progressively worsen, and the patient may become a public burden and expense. Badly needed beds in mental hospitals may be occupied by those (few or many) who refuse treatment which competent and expert medical practitioners prescribe. Where the proposed treatment is conducive or necessary for the cure or amelioration of mental illness, the failure to provide it would be a step backward in the history of mental hygiene. [App. p. 124a].

Appellant argues, however, that if we concede the right of others to refuse treatment because they are Christian Scientists or hold similar religious views in this regard,

then in the present case, where there is clear evidence that appellant's religious views pre-dated by some years any allegations of mental illness and where there was no contention that the current alleged mental illness in any way altered these views, there is no justification for defendants-appellees substituting their own judgment for that of their patient. The Illinois Supreme Court in *In Re Brooks Estate,* 32 Ill.2d 361, 205 N.E.2d 435 (1965) recently considered this question at some length.

> When approaching death has so weakened the mental and physical faculties of a theretofore competent adult without minor children that she may properly be said to be (legally) incompetent, may she be judicially compelled to accept treatment of a nature which will probably preserve her life, but which is forbidden by her religious convictions, and which she has previously steadfastly refused to accept knowing death would result from such refusal? [205 N.E.2d at 438].

The court answered this question in the negative and ruled that even if she were found to be legally incompetent, she nevertheless was entitled to refuse treatment because of her religious beliefs.

To what extent then may the state constitutionally compel actions which violate an individual's religious beliefs? The Supreme Court has here, as in a number of other areas, arrived at an "ad hoc" balancing test which examines the facts of each particular case to establish the contours of the free exercise clause rather than attempting to formulate any *per se* rules. The leading case is Mr. Justice Jackson's opinion in *West Virginia* v. *Barnette,* 319 U.S. 624 (1943).

> In weighing the arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for trans-

> mitting the principles of the First Amendment and those cases where it is applied for its own sake. The test of legislation which collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include so far as the due process test is concerned, power to impose all the restrictions which the legislature may have a "rational basis" for adopting. But freedom of speech and of the press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. [319 U.S. at 639].

It is precisely the same error of reasoning suggested by Mr. Justice Jackson that appellees and the court below made in the present case. At most, the arguments and cases on which they rely support the finding of a "rational basis" for the state acting in the way it did in the circumstances of Miss Winters' case, but First Amendment rights do not rest on such "slender grounds".

The appellees suggest a number of similar situations where the courts have held that the state's interest outweighs any First Amendment rights. [E.g. *Jacobson* v. *Massachusetts,* 191 U.S. 11 (1905) (compulsory vaccination); *Pierce* v. *Massachusetts,* 321 U.S. 158 (1944) (violation of the child labor laws); *Reynolds* v. *United States,* 98 U.S. 145 (1878) (polygamy); *People* v. *Handzik,* 410

Ill. 295, 102 N.E.2d 340 (1951) (criminal prosecution of faith healers who practice medicine without a license); *People* v. *Pierson*, 176 N.Y. 201 (1903) (serious illness of a child). These cases are, however, inapposite for each involved a clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his "free exercise" rights. In the present case, the state purports to find an "overriding secular interest of public health and welfare" in the "care and treatment of persons suffering from a mental disorder or defect and [in] the protection of the mental health of the state". Yet there is no evidence in the record that would indicate that in forcing the unwanted medication on Miss Winters the state was in any way protecting the interest of society or even any third party. The appellees rely on the fact that the Bellevue authorities found that she was "possibly" harmful to herself and to others. (This conclusion was indicated on one medical form after *one* examination, although at all other examinations conducted while she was hospitalized there was no indication of such tendencies.) Appellant, however, is not suggesting in this case that the authorities could not legally retain her in the hospital, but rather only that her First Amendment rights were violated as a result of compulsory medication.

The appellees also rely on Judge Skelly Wright's decision in *Application of President and Fellows of Georgetown Hospital*, 331 F.2d 1000 (D.C. Cir.), *rehearing denied*, 331 F.2d 1010, *cert. denied*, 377 U.S. 978 (1964). There the patient had refused a blood transfusion on religious grounds where she "was *in extremis* and hardly *compos mentis* at the time in question". What appellees neglect to mention, however, is that Judge Wright was very careful to limit his action to the extreme circumstances there present.

Appendix "A"

> The final and compelling, reason for granting the emergency writ was that a life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find that the law required action, was a risk I was unwilling to accept. [331 F.2d at 1009-1010.]

Finally, the appellees argue that the state was acting as *parens patriae* with respect to Miss Winters and therefore had the responsibility as well as the right to decide what was best for her under the circumstances. It is the state's *parens patriae* power which had been the legal basis for the long series of court decisions which have denied parents absolute religious freedom with respect to various aspects of the care and upbringing of their children. The appellees go on to state "[i]n the area of mental health too, the State assumes the ultimate responsibility for the care of its citizens. It is fundamental to New York and federal law that the State acts in *parens patriae* as concerns mentally incompetent persons."

The basic fallacy of appellee's case thus becomes obvious. While it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her and such a relationship may be created if and when a person is found *legally* incompetent, there was never any effort on the part of appellees to secure such a judicial determination of incompetency before proceeding to treat Miss Winters in the way they thought would be "best" for her. As appellant points out, even if there is some way to find the kind of compelling state interest required to override the First Amendment, there clearly was not a compelling interest in so summarily forc-

ing her to do so. Regular hearings of the New York Supreme Court are held in Bellevue Hospital every Tuesday morning. Plaintiff was admitted on Thursday evening. If appellees had respected her wishes for only four days, they could have brought her before the court for judicial resolution of the issue. At this hearing the appellant might have been able to persuade the court that she was not mentally ill. Or the court might have found that other alternatives would suffice. Under our Constitution there is no procedural right more fundamental than the right of the citizen, except in extraordinary circumstances, to tell his side of the story to an impartial tribunal. As Mr. Justice Frankfurter noted in his concurrence in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951):

> This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society.

Having concluded, therefore, that the appellant has stated a claim on which relief may be granted, we remand the case to the district court with instructions that it proceed to trial on the merits.

The appellant also challenges the constitutional validity of the New York statute which provides for the complusory fingerprinting and photography of state mental patients. Under section 34(9) of the Mental Hygiene Law the director of each state hospital is required within three days of admission to record the fingerprints and photograph every patient, whether admitted on a voluntary or involuntary basis. One copy of these is kept at the hospital and a second copy is filed with "any other state agency maintaining a fingerprint file".

The justification for this procedure offered by appellees is as follows:

> Fingerprinting and photography of those individuals committed to State mental hospitals may be seen as needed devices to aid in identification of patients, identification of former patients at State mental hospitals, and the possible discovery of prior criminal convictions (which might be necessary to uncover or aid in proper diagnosis and treatment).

Appellant contends that this procedure violates her Fourth Amendment right to privacy, her Fifth Amendment right to substantive and procedural due process, and her Fourteenth Amendment right to equal protection of the laws.

The result sought by appellant, however, is precluded by Judge Weinfeld's recent opinion in *Thom* v. *New York Stock Exchange,* 306 F. Supp. 1002, *aff'd per curiam,* 425 F.2d 1074 (2d Cir. 1970), *cert. denied,* —— U.S. —— (1970). These plaintiffs were challenging the constitutionality of the New York statute requiring the fingerprinting of employees of member firms of all national security exchanges. Judge Weinfeld noted:

> Plaintiffs' contention that fingerprinting is an affront to their dignity and an invasion of their privacy is without substance. The day is long past when fingerprinting carried with it a stigma or any implication of criminality. Federal and state courts alike, in upholding fingerprinting requirements, have rejected any such view. Our Court of Appeals, almost forty years ago, in upholding the right of federal agents to take fingerprints after an arrest upon probable cause, even in the absence of statutory authority, observed, "Fingerprinting is used in numerous branches of business and

of civil service, and is not in itself a badge of crime." 306 F. Supp. at 1007-1008.

Appellant attempts to distinguish this case by arguing that "no stigma is ordinarily attached to employment by stock exchange firms [while] the case is quite the contrary with confinement in mental hospitals". Absent some specific illustrations, however, appellant's argument that adverse collateral consequences will follow is mere conjecture.

The case is reversed and remanded with direction that the district court proceed to trial.

MOORE, *Circuit Judge* (concurring in part and dissenting in part):

I concur only in the portion of the majority opinion which holds that the appellant's constitutional rights were not violated when she was fingerprinted and photographed at Central Islip State Hospital, pursuant to §34(9) of the Mental Hygiene Law of New York.

I dissent as to the court's determination that it should reverse the trial court's grant of defendants-appellees' motion for summary judgment and, in effect, granting summary judgment for the plaintiff. I dissent on two grounds: first, because whether or not plaintiff's free exercise rights were violated, there is no appropriate relief which may be granted and hence the appeal should have been dismissed, and second, because plaintiff has failed to demonstrate an unjustified denial of any constitutional right.

I.

There are three named defendants in this case. They are: Alan D. Miller, M.D., Commissioner of Mental

Hygiene of the State of New York, Alexander Thomas, M.D., Director of the Psychiatric Division, Bellevue Hospital and Francis J. O'Neill, M.D., Director of Central Islip State Hospital. As to these three defendants, it is entirely clear that money damages are completely inappropriate since there is no showing whatever that they in any way condoned the administration of drugs to the plaintiff. It is not shown that any of them had any information whatever as to the beliefs held by Miss Winters, or for that matter the treatment being accorded to her. All the record shows is that she brought her objections to certain members of the staff of each hospital, presumably the defendants "doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff." Assuming, as the majority finds, plaintiff's constitutional rights were violated, an action under §1983 might be justified against the particular individuals who, acting under color of state law, unjustifiably violated plaintiff's constitutional rights. *Monroe* v. *Pape,* 365 U.S. 167 (1961). The named defendants were not such persons. In our recent decision in *Sostre* v. *McGinnis,* —— F. 2d —— (February 24, 1971), we held that Paul D. McGinnis, Commissioner of Corrections of the State of New York, could not be held liable under §1983 for damages notwithstanding that he knew of the fact of Sostre's confinement in segregation since the record, while demonstrating that Warden Follette had (as the majority found) detained Sostre in segregation because of his legal actions against the Warden and because of his political beliefs, did not demonstrate that McGinnis had been informed of these underlying reasons for Sostre's confinement, although McGinnis did know of the fact of such confinement. As with McGinnis in *Sostre,* the named defendants herein were not shown to have been informed of the circumstances which led the majority herein to conclude that

plaintiff's rights were violated. In fact not only was there no showing that these defendants were aware of the plaintiff's religious beliefs but also there was no showing that these defendants were in any way aware of the treatment afforded Miss Winters.

To whatever extent, if any, the doctrine of "command responsibility" survives in the area of military affairs, that doctrine can have no applicability to the claim of responsibility in the state executive branch.

None of the "doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiffs" can be held by this court to be liable for damages since no such person or persons have been served.

Therefore, there is no basis for granting damages to anyone currently before this court. Furthermore, since Miss Winters is no longer under the control of any of the defendants, and there is no showing that she is likely to be brought under such control, it is clear that injunctive relief is also not in order. Similarly, declarative relief is inappropriate since there is no existing controversy.

The majority concludes "that the appellant has stated a claim on which relief may be granted" and thus "remand[s] the case to the district court with instructions that it proceed to trial on the merits". Based on the foregoing analysis, and barring any new evidence indicating injunctive or declarative relief may be appropriate, the district court may well conclude that no relief whatever is appropriate. However, I believe that we should have made this determination on the record before us and dismissed the appeal as moot as to the named defendants and for lack of jurisdiction over the person as to the unnamed defendants. In failing to make this determination, this Court has, in effect, issued declarative relief without a present controversy.

Appendix "A"

II.

Furthermore, the majority in my judgment, is not correct in its conclusion that plaintiff was in any way unjustifiably denied her constitutional rights.

After asserting, in effect, that there is no basis here for finding Miss Winters to be possibly harmful to herself and others, the majority suggests that "it may be true that the state could validly undertake to treat Miss Winters if it did stand in a *parens patriae* relationship to her" and that "such a relationship may be created if and when a person is found *legally* incompetent," and not by a proceeding under §§72(1) or 78(1).

Does the majority mean by this that a person who is deemed to be potentially harmful to others could not, even in an emergency situation, be given appropriate drugs to reduce the likelihood of such anti-social conduct in the absence of an adversary judicial determination of incompetence? In the face of danger to herself and others, must Bellevue's harried medical staff seek out a judge whenever the police present them with a person whose mental condition requires that she receive tranquilizers or other drugs to protect herself and others or do they mean that a person can be given drugs against his stated religious convictions in at least some circumstances where the patient has not been declared legally incompetent by judicial adversary determination?

I disagree in any event with the majority's implicit conclusion that, based on the record as it was before the court on the motion of defendants for summary judgment, the treating doctors were not justified in concluding that the medical treatment administered was not in the best interests of the patient and, on the contrary, would hold that this determination, being valid, justified the medical care given Miss Winters. The Millsian distinction between instances of harm to others and instances of harm solely

to self, relied on by the majority, would seem rarely if ever to be relevant in actuality because others are affected by virtually any action which an individual takes or fails to take. Thus, while Miss Winters might not have been likely to perpetrate a violent attack on her fellow patients had she not received the transquilizers here involved, the very conduct which led to her admission, if repeated in the ward, might well have been disruptive to the recovery of others in her ward, who themselves may have been suffering from psychological defects. Second, even if no one other than Miss Winters would have been directly aided by the treatment for the condition for which she was admitted, as Judge Travia pointed out in his opinion below, if mentally ill persons are not accorded proper treatment, their "condition may progressively worsen, and the patient may become a public burden and expense".[1]

More fundamentally, I believe that a §78(1) admission, as well as a two-physician admission under §72(1) constitutes a quasi-judicial determination under state law authorizing medical care of an individual notwithstanding her lack of consent thereto. The majority, while conceding that after a proper proceeding, such as New York's procedure for the adjudication of incompetence, it "may" be permissible for the state to administer involuntary medical care notwithstanding the religious view of the patient on a *parens patriae* basis (presumably without having to demonstrate any likelihood that the patient is dangerous to

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[1] The effects on others thus pointed out are at least as significant as the effects involved in similar cases in the past. *Pierce* v. *Massachusetts*, 321 U. S. 158 (1944) [economic effect on others of giving jobs to the few minors with real religious objections to child labor laws probably minimal]; *Reynolds* v. *United States*, 98 U. S. 145 (1878) [speculative whether polygamous relationship harms children of such union; harm to society minimal where permission for such marriages conditioned on religious viewpoint].

others) suggests that the §§78 and 72 procedures are inadequate from a due process point of view to justify such a *parens patriae* role. However, regardless of the validity of such determination from a due process point of view, the staff of the two hospitals here involved should be entitled to rely on such quasi-judicial authorization. Furthermore, plaintiff has explicitly chosen not to challenge the constitutional validity of the procedures under §§78 and 72. The majority suggests, in effect, that even assuming the validity of these determinations under §§78 and 72, their effect must, as a constitutional matter, be diminished so as not to provide for forced medical treatment in cases of religious objection because New York has chosen to allow mentally ill persons undergoing involuntary medical care under these two sections to continue to exercise rights over property pending adjudication of "incompetence". With this conclusion I disagree.

That New York separates medical and legal aspects of the problem of mentally ill persons and provides for separate determinations in each area merely shows its enlightenment, since appropriate medical care hopefully might enable a person to continue to conduct his own affairs in other respects. The two-physician certificate procedure of §72(1) is subject to a judicial hearing. That procedure at least should meet the majority's concern that the patient be afforded an opportunity "to tell his side of the story". The §78(1) emergency admission procedure is not an adversary proceeding but obviously due process does not preclude preliminary relief in an emergency situation on an *ex parte* basis, including the right to administer involuntary medical treatment.[2]

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[2] As noted, the admission procedures here involved are specifically not challenged by the appellant. Furthermore, § 78 has been amended since the time of the hospitalization of Miss Winters.

Appendix "A"

In my view, Judge Travia has in a well-reasoned opinion based upon a sound analysis of the law and the facts reached reached the correct decision and, accordingly, I would affirm the order of the district court. I would also dismiss the appeal as moot as to the named defendants and for lack of jurisdiction over the person as to the unnamed defendants.

Appendix "B"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

69-C-783

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Plaintiff,

against

ALAN D. MILLER, M. D., as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M. D., as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M. D., as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Defendants.

APPEARANCES:

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Appendix "B"

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Thomas F. Burchill, Esq.
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Of Counsel

TRAVIA, D. J.

At the outset, the Court must commend the attorneys representing the parties for their very fine moving and opposing papers, their thorough briefs and their articulate presentation of the facts and law on the oral arguments.

The facts surrounding this action are thoroughly and with particularity set forth in the papers on file but for the purpose of this memorandum of decision the Court shall set forth those facts which seem to bear more importantly on the issues raised in this case.

At about 4:00 o'clock P.M. on May 2, 1968, the plaintiff, MIRIAM WINTERS, was taken from her room in the King Edward Hotel to Bellevue Hospital, both in New York, New York, on the authority of New York City Police officers, one of whom apparently came from the 18th Precinct and had Badge No. 14010. The "Ambulance Call Report" of the Department of Hospitals indicates that the call was on an emergency basis by police radio.

Prior to her removal, Miss Winters had been on welfare for about ten years, and had only worked for a short period during her lifetime. She was taught at home for ten years until she was eighteen years old. Both her parents are deceased. Her father was a medical doctor in his lifetime. She is now 59 years old. There is some indication in the record that plaintiff had a previous history of psychiatric treatment at Kings County Hospital.

Appendix "B"

On March 21, 1968, before the occurrence of the incidents which are the basis of this case, Dr. Robert Reich, Psychiatric Consultant to the Department of Welfare, Wyckoff Welfare Center, wrote a letter to the Admitting Psychiatrist of Kings County Hospital, the body of which is as follows:

> "Miss Miriam Winters of 55 Pierrepont Street, is a 55 year old woman, who is continuing to be disruptive in her hotel. She plays the radio all night and guards the public bathroom claiming it is her own. She has not washed in five years and her appearance is totally dirty and dishevelled. She has been unable to leave her room for some years and the hotel has been sending food to her room. She has refused medical help of any kind. She has been sending letters to the Mayor's Committee demanding a room with a bath, but despite attempts by the department to help her move, she has been unable to leave the hotel room or to clean herself up so that she could be acceptable in a public hotel. There are no relatives who can help her and we feel that in her present condition she is a danger to herself in that if no food is brought to her she will starve, as well as her argumentative behavior and the guarding of the bathroom make it utterly impossible to live with others.
>
> I would, therefore, recommend that she be sent to Kings County Hospital for evaluation and treatment of this chronic problem which has grown worse over the years."

Some time after Dr. Reich wrote this letter, plaintiff did move from where she had been living to the King Edward Hotel in Manhattan.

Appendix "B"

The events leading to the summoning of the police and the calling of the ambulance by the police are not entirely clear from the record. However, plaintiff's allegations that, on May 1 or May 2, 1968, the welfare case worker, a Mr. Karren (or Caron) and the hotel management sought, and failed, to have plaintiff change her room, and then sought the aid of the police, appear uncontradicted. Plaintiff claims that when the police arrived, they failed to give her sufficient identification or to state their reasons for seeking access to her apartment; that she then excluded them; that the room was then forcibly entered; and that plaintiff was taken to the hospital against her will.

No challenge is made to the legality of the commitment, and it appears to have complied with the New York Mental Hygiene Law, § 78(1) and (3).

Plaintiff claims that for at least ten years before her commitment, she had been a student and follower of the Christian Science religion. Followers of Christian Science hold that they should not submit themselves to medical treatment of a physical nature though psychological treatment is acceptable.

Upon her admission to Bellevue, plaintiff alleges, she informed the doctors who treated or spoke to her that she was a Christian Scientist. Dr. H. Blankfeld noted at that time that plaintiff refused to undergo a physical examination. He quoted her as saying, "I am a Christian Scientist and prefer you wouldn't." Notations to this effect appear at several points in the records kept by the hospital, indicating that the hospital should have been aware of plaintiff's claimed beliefs. Central Islip State Hospital, to which plaintiff was transferred on May 13, 1968, pursuant to Mental Hygiene Law § 72, as well as that hospital's doctors, were similarly aware of her claimed beliefs.

On the "Clinical Summary" sheet at Central Islip State Hospital appears a "Summary of First Admission" in

which Dr. Christine Jordan reported that:

> "Patient states to be religious but does not go to church. She is of the Protestant faith. 'I am an independant [sic] Christian scientist.' "

Plaintiff contends, although contested by defendants, that at both Bellevue and Central Islip, against her will, she was given injections of tranquilizers and also against her stated objections, she was given, and she took, various oral medications. She also states that these were taken contrary to her religious beliefs. On several occasions, plaintiff refused oral medication. A note on a hospital form at Central Islip for May 13 indicates that plaintiff was:

> "Demanding—refused p.o: meds [oral medication]; Unco-operative [at] times—transfered [sic] 101
>
> F. Urban."

Later the same evening, plaintiff was found to be more cooperative, though subsequently she again refused the oral medication.

A Social Service Record Activity Summary by M. Koster, PSW Trainee II, reported, on May 17, 1968:

> "Also indignant due to the fact that she is a Christian Scientist and is being forced to take medication. She is constantly berating the hospital and officials for violating her personal rights and privileges as a human being and as a Christian Scientist. She says she will seek court action to get her out and that she would fight those violations, to try and attain a victory on behalf of human rights for an American citizen and specifically for the beliefs of all Christian Scientists."

Appendix "B"

On May 18, 1968, it was noted that the plaintiff was,

> "Very Lethargic. Taking meds p.o.—Resistive to many procedures because she states she is Christian Science."

While at Central Islip, it appears that plaintiff was given a smallpox immunization (May 17) and tetanus toxoid immunizations (May 13 and June 14). The hospital records indicate that medication, intramuscular or oral, was given daily while plaintiff was in the hospital.

Among plaintiff's possessions, held by Central Islip Hospital, was a Medicaid Card, No. 1479709, expiration date December 31, 1968, which must have been obtained on her application for such card. What she would do if it became necessary to use said card is not known.

While plaintiff was a patient at the two hospitals, a report and diagnosis of her condition was made frequently and proper entries appear in the hospitals' records. On May 2, 1968, Dr. H. Blankfeld reported on plaintiff's Admission Record at Bellevue that plaintiff was:

> "[e]vasive, guarded, suspicious, negative [?]
>
> Speech—Pressured, L.O.A. tangential, irrelevant. illogical
>
> Thought—Delusions of persecution & grandeur
>
> Denies hallucination, suicidal homicidal ideati [?]
>
> Sensor-Clear—Oriented X3
>
> Judgment/Insight—Nil — *Spp* — CSR -- PT."

It appears that the notation "CSR-PT" was a preliminary finding of chronic schizophrenic reaction-paranoiac type. A nurse's report apparently of the same day indi-

cates that plaintiff was admitted at 6:10 P.M.:

> ". . . in õ [no] acute distress,"

and was placed in bed.

A social service worker, Lela Zaphirapoulos, reported, also on May 2, 1968, that:

> "Pt. [patient] is very verbal, seemingly paranoid, tends to get off the subject to launch into discussions about religion, 'evil.' "

On May 7, 1968, two physicians, Sandra Grant and Gerald Ollins, examined plaintiff and signed a "two-physicians certificate," *cf.* N. Y. Mental Hygiene Law, § 72, which reads in part:

> "4. The patient showed the following psychiatric signs and symptoms:
>
> Pt. is circumstantial, vague, evasive, hostile and paranoid. Her thinking is very rigid and concrete with impoverished personality. No insight and her judgment is nill. [sic] Her affect is inappropriate. Pt. is not able to take care of herself and needs long term hosp.
>
> 5. Does the patient show a tendency to injure [herself]? poss; to injure others? poss
> Explain [blank]
>
> 6. Mental diagnosis (if determined) CSR/paranoid type."

The "face sheet" of plaintiff's Bellevue record also has a notation, under the heading of Psychiatric Diagnoses, "CSR/par. type."

The records from Central Islip Hospital also repeat, in several places, the diagnosis of schizophrenia, paranoid

type. On the "Clinical Summary" appears the following entry:

> "*Outset and Symptoms:* Patient had a history of persecution and religious preoccupation. She had a Bible in her hand at the time of admission. She stated that she went to Bellevue only for a few days of rest, 'But I was tortured there. People bother me, they want to kill me with their medication.' "

The records indicate an improvement in plaintiff's condition while she was at the hospital. On June 18, 1968, plaintiff's status was changed from involuntary to voluntary. She was apparently not a discipline problem, and was granted an "Honor Card" on June 19, 1968. By June 22, 1968, a note by a B. Paul indicates that plaintiff was "Cooperative, Tends to Needs" and that she "Appears More Alert—."

Plaintiff was finally discharged in her own custody on July 18, 1968, at which time she was given a week's supply of a medication called "Mellaril," 50 milligrams, to be taken twice a day. Whether she took medication after leaving is not known. On the date of discharge, plaintiff's Clinical Summary sheet reads in part as follows:

> "*Mental Diagnosis:* SCHIZOPHRENIA, PARANOID TYPE.
> *Mental Condition:* MUCH IMPROVED."

Both hospitals' records are replete with information indicating that plaintiff was mentally ill, and that her illness had been immediately diagnosed as schizophrenia, paranoid type. Some of the incidents prior to her admission to Bellevue seem to confirm the diagnosis. The preliminary diagnosis made by Dr. Blankfeld on May 2, 1968, and the apparently independent interpretation of the social worker, were confirmed by subsequent diagnoses of the attending doctors.

Appendix "B"

Plaintiff has never been formally declared an incompetent nor has a committee of her person been appointed. As a "patient" in a mental institution under the Department of Mental Hygiene, she was under the jurisdiction and "custody" of the State Supreme Court, which had the responsibility ". . . for the safekeeping, support and maintenance . . . of the incompetent. . . ." The Court had the power to ". . . appoint a committee of the person. . . ." Mental Hygiene Law, § 100. Such a committee may be appointed without a trial in a summary procedure under § 102(1) and (2), upon the showing that the person for whom a committee of an incompetent is sought ". . . has been legally . . . admitted to an institution and is at the time a patient thereof. . . ." Since plaintiff could summarily have been found to be an incompetent, the lack of any formal incompetency finding has no effect on this litigation.

I

A. The defendants have separately presented motions to dismiss this action under F.R.C.P. 12(b)(1) and (6). Since material outside the complaint has been presented to the Court, the 12(b)(6) motions will be treated as motions for summary judgment. F.R.C.P. 12(b) and 56. Plaintiff has cross-moved for summary judgment, and in addition, seeks ". . . (a) . . . an order pursuant to 28 U.S.C. Sec. 2284 convening a three-judge court to hear and determine this action; (b) . . . an order denying defendants' motions to dismiss the complaint; [and] (c) . . . an order pursuant to Rule 23 of the Federal Rules of Civil Procedure determining that this action may be maintained as a class action. . . ."

B. Jurisdiction is founded on 28 U.S.C.A. § 1343(3) and 42 U.S.C.A. § 1983; plaintiff claims that the defendants have violated her constitutional rights while acting

under color of State law in that the defendants, through their agents, required plaintiff to be fingerprinted and photographed, pursuant to New York Mental Hygiene Law, § 34(9-a), in violation of plaintiff's rights to privacy under the Fourth Amendment to the Constitution, and in that the defendants forced plaintiff to be subjected to injections of, and the taking orally of, medicines contrary to plaintiff's religious beliefs, desires, and practices.

Plaintiff seeks injunctive relief declaring that the State return copies of her photographs and fingerprints to her, as well as a declaration that § 34(9-a) is unconstitutional.

Although plaintiff is no longer confined in a mental institution, this Court concludes that this action is not moot, contrary to defendants' contention. She seeks damages for the physical intrusion on her person contrary to her religious beliefs. In this aspect, this case is no different from any other personal injury action for damages. Since the State still retains the photographs and fingerprints allegedly taken contrary to the requirements of the Constitution, this portion of the case presents a controversy appropriate for adjudication.

C. Preliminarily, defendant Thomas has claimed that no cause of action has been stated against him because he has immunity from suit under the Civil Rights Act as the Director of the Psychiatric Division, Bellevue Hospital Center, an agency of the City of New York, and is thus ". . . an intricate part of the municipality. . . ."

Although *Monroe* v. *Pape,* 365 U. S. 167, 187-192 (1961) did hold that a city is not subject to suit under the Civil Rights Act, 42 U.S.C.A. § 1983, the case also held, 365 U. S. at 172-187, that police officers, employees of the city, were liable to suit under the act. Officials of state and city hospital systems have specifically been held to have no immunity in suits brought under 42 U.S.C.A. § 1983 in at least two Second Circuit cases, *Birnbaum* v. *Trussell,*

347 F.2d 86 (2d Cir. 1965) and *Jobson* v. *Henne*, 355 F.2d 129 (2d Cir. 1966). In *Birnbaum* v. *Tussell, supra*, the Court stated:

> "It would nullify the whole purpose of the civil rights statutes to permit all governmental officers to resort to the doctrines of official immunity. The statutory condition of defendant's acting 'under color' of state or territorial law contemplates that he act in an official capacity. To the extent that state or municipal officers . . . violate . . . constitutional and federal rights, the Civil Rights Law . . . 42 U.S.C. § 1983 . . . abrogate the doctrine of official immunity." 347 F.2d at 88-89.

Official immunity does not extend to the present defendants.

D. It should also be noted that no issue has been raised in the present case of the legality of the commitment of plaintiff or of the procedures used. That has been conceded. *Cf. U. S. ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2d Cir. 1969); *In re Buttonow*, 23 N.Y.2d 385 (1968).

E. Plaintiff's request for a three-judge court is made pursuant to 28 U.S.C.A. § 2281, which requires the convening of such a court in a case in which an injunction against the enforcement of a State statute on the ground that it is unconstitutional is sought. When a basis for equitable relief is, as here, " . . . at least formally allege[d] . . . " a single judge District Court's jurisdiction is " . . . appropriately limited to determining whether the constitutional question raised is substantial. . . . " *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). If the alleged constitutional claim is found to be insubstantial, the single judge need not call a three-judge Court to determine the matter. *Ex Parte Poresky*, 290

U. S. 30 (1933); *Swift & Co.* v. *Wickham,* 382 U. S. 111, 114-115 (1965). Such a claim is insubstantial when it is " 'obviously without merit.' " *Ex Parte Poresky, supra,* 290 U. S. at 32.

Since the constitutionality of no statute and the granting of no injunctive relief are in issue on the question of the coerced taking of medication, the remaining issue is plaintiff's right to damages for defendants' actions. No requirement for a three-judge Court arises on this issue. The question of the substantiality of the claim that Mental Hygiene Law, § 34(9-a), is unconstitutional is discussed hereafter.

F. One should keep in mind, in discussing the questions which arise from the facts in this case, the duty and responsibility of the State to a patient in a mental institution and to the health and welfare of the people of the State, particularly in its care and treatment of a patient who is involuntarily committed because of some emergency, as contrasted with the relationship, in most cases voluntary, and the duty and responsibility of a private physician to *his* patient in *his* chosen hospital. In the latter case, the duty to the patient is paramount to all else, though expertise gained from such a relationship in preserving health may indirectly benefit the state. One must also bear in mind the distinction between voluntary and involuntary patients in mental institutions. Involuntary patients do not come in on their own but are brought in by police for emergency observation, care or treatment under § 78 of the Mental Hygiene Law. Voluntary patients are admitted under § 71 of that Law. Whether voluntary or involuntary, however, the Department of Mental Hygiene requires prior written consent before serious treatment such as electro shock or surgery may be performed. Affidavit of Bertram Pepper, M. D., September 10, 1969, p. 2.

Appendix "B"

II

Plaintiff claims that her rights were violated by the taking of her photographs and fingerprints at Central Islip State Hospital, under the authority of N. Y. Mental Hygiene Law, § 34(9-a).

Section 34(9-a) provides that upon admission of patients over 16 years old to hospitals within the Department of Mental Hygiene, photographs and fingerprints shall be taken of the patients (if their condition permits). One copy of the photo and of the fingerprints is to be retained at the hospital, not to be released except upon the Commissioner of Mental Hygiene's consent or upon a court order. A second copy of the fingerprints is to be sent to the Department's Albany office and to any central State fingerprint file.

The photograph and fingerprint section of the Mental Hygiene Law, § 34(9-a), derived from § 34(9), which provides, in part, that the director of a state institution under the Mental Hygiene Law:

> ". . . within three days after the reception of a patient, shall make, or cause to be made a descriptive record of such case. He shall also make or cause to be made entries from time to time of the mental state, *bodily condition* and medical treatment of such patient. . . ." (Emphasis added).

One purpose of the requirement of photographing patients is suggested by this derivation of the photographing section, namely, as an aid to keeping a record of the physical condition of a patient, who may require treatment or supervision because of potential physical or medical danger, at the time of arrival at the hospital.

Another use of fingerprinting and photographing may be as aids in locating patients who are lost while out of

the hospital or on the hospital grounds. Plaintiff herself states that while she was at Central Islip she was given an "honor card" which permitted her to ". . . leave the ward and walk freely about the hospital grounds." If she had gotten lost, the photograph might have been of assistance in locating her. A photograph might also help to locate missing persons (i.e. the patients) or help locate friends or relatives of the patient who could help in treatment or diagnosis. *Cf.* N.Y.S. Bar Ass'n, Legis. Rept. No. 117, attached to affidavit of Bruce J. Ennis, plaintiff's attorney.

Fingerprints might be useful in identifying a patient, e.g. after an accident or if the patient, because of his condition, fails to give his name or gives an incorrect name, or to determine if someone who was admitted to an institution has had previous mental care (whether under the same name, an assumed name, or a maiden name) which might be relevant to the treatment required.

Plaintiff argues ". . . that the taking of her fingerprints and photograph violated her Fourth Amendment right to privacy (the right to be let alone), her Fifth Amendment right to substantive and procedural due process, and her Fourteenth Amendment right to equal protection of the laws."

Plaintiff suggests that fingerprinting is an outrageous procedure for mental patients, since it is normally used only in criminal cases to aid in identifying a defendant or to determine if the defendant has a prior criminal record. To support this proposition, *Campbell* v. *Adams,* 133 N.Y.S. 2d 876 (Sup. Queens, 1954) is cited. In that case, the Court held that when a boy had been picked up and fingerprinted on a criminal charge, but had only been adjudicated a "wayward minor," and not convicted of the criminal charge, he had a right to have the fingerprints returned. The Court was concerned with the stigma at-

related to fingerprints and with the retention of the prints on the boy's record although the offense was in effect eliminated from the record. However, it is apparent from the case itself that the Court was only talking in the context of (1) fingerprints taken in connection with a criminal case, and (2) a statute which provided that when a defendant was acquitted, he had a right to the return of the prints. No suggestion is made by the Court that it was dealing with the taking of fingerprints in connection with admission to a mental hospital or that it had given any consideration whatever to the situation presented here. However, the stigma attached to the taking of fingerprints in a criminal case is not present in the taking of photographs and fingerprints upon admission to a hospital; no criminal record is involved at all.

Misemphasizing *Davis* v. *Miss.*, 394 U. S. 721 (1969), plaintiff suggests that the taking of fingerprints and a photograph are, by themslves, invasions of privacy. However, on the question of fingerprints *per se* as invasions of privacy, the *Davis* Court only said that "[f]ingerprinting involves none of the probing into an individual's private life and thoughts which marks an interrogation or search." 394 U. S. at 727. Instead, *Davis* turned on the fact that there was a *detention* without probable cause, and therefor a seizure of the defendant in violation of the Fourth Amendment. Exclusion of the fingerprints taken at the illegal detention was then based on the ordinary exclusionary rule of unconstitutionally seized evidence under *Mapp* v. *Ohio*, 367 U. S. 643 (1961). No such unlawful incarceration is present here.

As plaintiff admits, assuming the fingerprint taking to be some invasion of privacy under the Fourth Amendment, it can only be an "unreasonable" search or seizure in the present context if "[t]he state has no legitimate need for, or interest in, plaintiff's fingerprints or photograph."

However, as already seen, New York has a legitimate interest in taking these fingerprints and photographs.

The claim that "substantive due process" has been violated because fingerprints and photographs were taken without the State's having ". . . a substantial and legitimate state purpose" raises the same question, and requires the same answer, as the issue of "right to privacy."

As to the "procedural due process" argument, the plaintiff has already conceded, see *supra* at p. 14, that her commitment was lawful. In *Davis,* the Court was concerned with taking of prints when the incarceration was unlawful.

Finally, plaintiff claims that she has been denied the equal protection of the laws, since she, as an inmate of a hospital run by the Department of Mental Hygiene, was fingerprinted and photographed, while inmates of local or private institutions are not required by law to undergo the same procedures. This argument assumes, however, that the State has made some irrational and discriminatory distinction between inmates of both types of hospitals, although the same patient could be admitted to either. *Cf.* Mental Hygiene Law, § 72(1), § 2(4-a).

However, although the Mental Hygiene Law has detailed provisions for the regulation of state institutions under the Department of Mental Hygiene, *cf.* Mental Hygiene Law, § 11(1), the State of New York has only undertaken to license and supervise private mental institutions. Mental Hygiene Law, § 424. No detailed provisions of how these private institutions are to be run are set out in the law. Thus, the State, in providing for reasonable rules and regulations of the State's institutions does not also have to provide a detailed code for private institutions, which are left to determine their own procedures. The State only requires that private institutions live up to the terms of their licenses. Mental Hygiene Law, § 424(4).

Appendix "B"

Plaintiff seeks return of the fingerprints and photographs because criminal defendants, if acquitted, have a right to reacquire their prints and photos. This does not deal with a criminal prosecution. The prints were not taken because plaintiff was a criminal, and the right to take them does not in any way depend upon plaintiff's having actually been adjudicated to be an "incompetent." The purpose of, *e.g.*, aiding in determining if plaintiff had previously been treated in a State mental institution require that, if in fact she has been treated, the means of identifying her in the future be retained. Unlike a criminal prosecution, where retention of the prints might aid in future arrests to the detriment of the defendant, here the retention of the prints and history becomes important to treatment.

The claim that New York Mental Hygiene Law, § 34(9-a) is unconstitutional is "obviously without merit" and consequently is insubstantial.

III

Plaintiff, a Christian Scientist, contends that the administration of medical treatment while she was involuntarily committed to a state mental hospital, was against her religious beliefs and violated her constitutional rights of free exercise of religion under the First Amendment as applied to the States through the Fourteenth Amendment. Since defendants' acts were under color of State law, plaintiff seeks damages from them under 42 U.S.C.A. § 1983.

The Free Exercise clause of the First Amendment has generally been divided into two branches: the freedom to believe and the freedom to act. Freedom of religious belief is absolute. "Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden." *Braunfeld* v. *Brown*, 366 U. S. 599, 603 (1961);

Cantwell v. *Conn.*, 310 U. S. 296 (1940). "However, the freedom to act, even when the action is in accord with one's religious convictions, is not fully free from legislative restrictions." *Braunfeld* v. *Brown, supra* at 603; *Prince* v. *Mass.*, 321 U. S. 158 (1944).

To deal with the proposition that the treatment given plaintiff violated her constitutional rights, the parties have referred this Court to several cases involving surgical operations and blood transfusions of persons who objected on religious or other grounds. *E.g. Application of President & Directors of Georgetown Col.*, 331 F.2d 1000, *reh. den. en banc*, 331 F.2d 1010 (D. C. Cir. 1964), *In re Clark*, 185 N.E.2d 128 (Ohio Com. Pleas 1962); *People* v. *Labrenz*, 104 N.E. 2d 769 (Ill. 1952); *Raleigh Fitkin-Paul Morgan Mem. Hosp.* v. *Anderson*, 201 A.2d 537 (N. J. 1964); *Collins* v. *Davis*, 254 N.Y.S. 2d 666 (Sup. Nassau 1964); *Erikson* v. *Dilgard*, 252 N.Y.S. 2d 705 (Sup. Nassau 1962); *In re Brooks' Estate*, 205 N.E.2d 435 (Ill. 1965).

These cases suggest that when there are strong interests of the State other than the welfare of the patient alone, the patient's religious objections may be ignored when treatment is necessary. Thus, if the treatment of an adult would affect the welfare of a dependent child, treatment, such as operations or transfusions, has been allowed. *E.g. Raleigh Fitkin-Paul Morgan Mem. Hosp.* v. *Anderson, supra; Application of President & Directors of Georgetown Col., supra.* And to save a child from imminent death, parents' religious objections may be ignored. *E.g. In re Clark, supra; People* v. *Labrenz, supra; People* v. *Pierson*, 176 N. Y. 201 (1903) (criminal penalties for parents' failure, on religious grounds, to summon medical aid for dying child).

Similarly, the public interest in preventing the spread of communicable disease permits compulsory immunization, enforced by criminal penalties, against objections, *Jacob-*

son v. *Mass.*, 197 U. S. 11 (1904), including objections on religious grounds. *Mosier* v. *Barron County Board of Health*, 215 S.W.2d 967 (Ky. 1948).

Where the ability of the patient to choose his type of treatment is unquestioned, because his mental capacities have been unimpaired, he is allowed to choose the scope of the treatment, even to the extent of refusing medically necessary blood transfusions. *In re Brooks Estate, supra; Erickson* v. *Dilgard, supra. Contrast Collins* v. *Davis, supra* (patient in comatose state; operation permitted). However, in the *In re Brooks' Estate* case, *supra,* the Court made clear that its ruling was made in a situation where there was no public interest, such as the presence of dependent children, involved.

Although these cases are instructive on the problems of treatment of persons (competent and incompetent) against their religious beliefs, they ultimately are inapplicable to the present case. This case is the first to come to this Court's attention which concerns the treatment of involuntary patients in State mental institutions.

In mental illness cases, the public interest in treating and curing patients is greater than the public interest is in cases of physical illness. Most patients who are physically ill will be able to determine that they need treatment and, when informed by their physicians, will be able to make a reasoned decision as to the type of treatment to which they wish to subject themselves. But a mental patient, because of the nature of the illness, may be unable either to seek appropriate treatment or to determine what treatment to allow. For the physically ill person, where there are no dependent children or communicable disease involved, the danger from a refusal, on religious or any other grounds, to allow a particular type of treatment may be that the patient will be seriously ill for a period or may die. Only the patient and his immediate family are likely to be aggrieved

or injured as a result. On the other hand, where the mental patient is not properly treated, the condition may progressively worsen, and the patient may become a public burden and expense. Badly needed beds in mental hospitals may be occupied by those (few or many) who refuse treatment which competent and expert medical practitioners prescribe. Where the proposed treatment is conducive or necessary for the cure or amelioration of mental illness, the failure to provide it would be a step backward in the history of mental hygiene.

Who else is better qualified to give care and treatment than those in whom the State places its trust to care for and treat the mentally ill?

For those for whom advanced medical treatment is not provided the danger exists that a cure which might be effected would be lost. Mental institutions would potentially be limited to acting as custodians of those mentally ill persons, for their own safety and that of the public as was true in earlier periods of caring for the mentally ill. *Cf.* Marsh W. Breslin, Preface to McKinney's New York Mental Hygiene Law, "History of Mental Hygiene Law," xii-xiii. It was only gradually that it was recognized ". . . that insanity as such was a condition akin to a physical ailment and one in which care and cure were becoming the fundamental objects. . . ." *Id.* at xiii. No longer is mere custody of the mentally ill person the primary aim of mental institutions. Instead, it is ". . . only a requisite and a device by which those who require treatment and care must be controlled and detained for their own benefit and for the benefit of the public in general. . . ." *Id.* at xiv. ". . . [A]nalysis of the present Mental Hygiene Law indicates clearly that the authorities have made tremendous advances in the custody, care and treatment of the mentally ill, mental defectives and epileptics. The present law has also begun consideration of preventive procedures insofar as those subject to mental incapacities are con-

cerned by the establishment of research projects. public education and a concerted effort to recruit and train adequate personnel for the care of those thus afflicted." *Id.* at xiv-xv.

Involuntary patients in mental institutions present special problems. As in the present case, they are frequently brought into the institution on an emergency basis. They are frequently severely mentally ill. Because of an intrusion on the public, either by disorderly conduct, *cf.* Mental Hygiene Law, § 78(3), or by action which is a danger to the individual or to others, the patient may have to be brought in forcibly. To restore the patient to his freedom or to retain him in custody without treating him properly would be a violation of the duty of the Department of Mental Hygiene to both that patient and the public. Without treatment, the patient's dangerousness or disorderliness is likely to continue unabated. In the present case, where there is an indication that the plaintiff's illness had been getting progressively worse, retaining her or allowing her out of the hospital without either curing her or acting to arrest the progression of the disease would be grossly improper. Faced with a patient who had a chronic schizophrenic reaction of a paranoiac type, and who was brought into the hospital by an emergency ambulance, the doctors had to act in accordance with their expertise in treating mental illness. As plaintiff's condition improved, and the immediate emergency subsided, appropriate treatment was still necessary to induce the improvement in the plaintiff's condition indicated in the records. For the doctors to have done less would have been a violation of their obligations to the people of New York to seek to cure mentally ill patients so that they will no longer be dangerous or disruptive to themselves, or to the public, and so that they will no longer occupy scarce space in public mental health institutions.

Appendix "B"

It appears from the records that the plaintiff had no relatives and only two friends who could be called upon by the hospitals for their help. One was a Mrs. Gertrude Butler, who was called on May 2, 1968 (the date of admission) and who stated she could not visit plaintiff. The other was one who might have helped, Mr. Benjamin Rippe, who, plaintiff stated, was her Christian Science Practitioner. However, he was called but he apparently did not return the call.

In the Social Service Record, under the title "Activity Summary" the following appears:

> "July 8, 1968: . . . Social worker called Mrs. Butler [sic] that afternoon, asking if this was possible [if plaintiff could stay with Mrs. Butler as requested by plaintiff] and was told that it was not."

Also Dr. Reich's letter, *supra* at p. 3, states:

> ". . . no relatives who can help and we feel that in her present condition she is a danger to herself. . . ."
>
> "This chronic problem has grown worse over the years."

By a "Notice of Application and Patient Admission," dated May 6, 1968, plaintiff was informed of her right to seek the aid of the Mental Health Information Service. In the three months, during which she was confined as an involuntary and voluntary patient, no appropriate application was made by, or on behalf of, the plaintiff in spite of the availability of the protections accorded under the Mental Hygiene Law and the procedures of the Mental Hygiene Department and particularly Mental Hygiene Law, §§ 88 and 70(6), (7), which set up the New York Mental Health Information Service, a service created as a neutral advisor which could act independently to take care of patients, to help them with their problems and to seek the

aid of the Court where necessary. Thus, the hospitals were left to their own discretion, without the aid of a relative, friend, or the Information Service in determining what treatment was required for plaintiff's condition.

The decisions of the Courts in the cases cited indicate that a limitation on religious practices is proper when there is a compelling public interest which conflicts with the individual's private religious interest. In such circumstances the government may protect and promote the general health, safety and welfare of its citizens even where the result proves to be inconvenient or offensive to an individual's religious belief without the government's invading the liberties protected by the First and Fourteenth Amendments.

Such an interest in public health and welfare exists here. We are not dealing here with a person who voluntarily sought admission to a hospital for certain treatment, but, one who was brought in involuntarily and placed under the care of the State. Thus, circumstances justify the interference of the State with the patient's personal interests. The hospitals acted in a manner of guardians when they administered treatment; they were acting both in the interests of the plaintiff and of the State in assuming responsibility and ordering treatment.

In contrast to the admission procedures presently in effect, plaintiff originally sought to bar the admission of patients to a State mental hospital prior to a full Court hearing. This argument was withdrawn at the hearing.

Plaintiff's complaint may be construed as contending that no medical treatment may be given to a patient in a State mental institution unless there has been a prior court hearing. The statements of Dr. Bertram Pepper in his affidavit regarding the commitment process are appropriate to this question, too:

> ". . . [I]ndividuals are admitted to State mental hospitals suffering from acute psychotic symptoms. To

delay the admissions of patients until a full-blown court hearing can be held, may result in a distinct danger to the patient or to society.

* * *

"2. Whether a person should be committed to a State mental hospital is a decision which should, in the first instance be made by doctors, not judges. As in many other areas of the law, the court should defer initially to the expertise of those individuals who have the responsibility of diagnosing and treating mentally ill patients on a daily basis."

* * *

"3. To foist upon the courts the initial responsibility of determining whether a person should be committed to a State mental hospital would be an awesome burden. Simply stated, the court is not equipped to handle this type of problem. The courts simply do not have the doctors, psychiatrists and facilities to examine individuals prior to their commitment to a mental hospital. When it is alleged that an individual should be treated as mentally ill, all a court can do is to send him to a hospital such as Bellevue, for observation and a report."

* * *

"4. To order a hearing prior to admission would immediately cast the prospective patient and the Department of Mental Hygiene in an adversary position. This would frustrate the entire method of treatment in state hospitals which attempted to have the doctors and staff communicate with the patient on a cooperative basis in an attempt to resolve the patient's problem."

As the Supreme Court stated in a different context, "[e]ven the exercise of religion may be at some slight in-

convenience in order that the state may protect its citizens from injury." *Cantwell* v. *Conn., supra,* at 306. The State interest here is in protecting its citizens from bearing the burden of a mentally ill person, whether committed in a hospital, without adequate care, or out of the hospital, where the plaintiff might well have continued to conduct herself ". . . in a manner which in a sane person would be disorderly . . ." N. Y. Mental Hygiene Law, § 78(3), and from having badly needed beds in mental hospitals occupied by patients who cannot be treated.

No question arises here of the hospitals having inquired into and rejected the validity of plaintiff's religious beliefs. *Cf. United States* v. *Ballard,* 322 U. S. 78 (1944). Instead, the doctors acted within the expertise of their medical training to effectuate the State's interest in treating and curing, as far as possible, the plaintiff's illness. Plaintiff's beliefs did not determine the scope of permitted actions by the defendants' agents nor did the defendants discriminate in any way against plaintiff because of her beliefs. It is not every act of State officials which happens to intrude on an individual's rights as protected by the Constitution which allows that individual to recover for that intrusion. When medical officials have acted in good faith to carry out their obligations to the State and its interests, without intentionally seeking to give a mentally ill patient a particular treatment just because it is objectionable to her on religious grounds, they may not be liable to that patient when the appropriate treatment has been given and the patient objects. *Cf. Pierson* v. *Ray,* 386 U. S. 547 (1967). Since in the present case no question arises as to the good faith of the medical authorities who treated plaintiff, this is such a case.

Plaintiff has suggested that the actions of the doctors here ". . . broadly stifle fundamental personal liberties . . ." and that ". . . less drastic means for achieving the same basic purpose," *Shelton* v. *Tucker,* 364 U. S. 479, 488

(1960), were available. She suggests that various means of psychological care, not involving physical treatment, were available and should have been used. First, it is difficult to see how there was a broad stifling of liberties here. However, even if plaintiff's liberties were "broadly stifled," the medical officials in charge of plaintiff's case in the hospitals acted with their best judgment of appropriate treatment to be given. Plaintiff must, in such circumstances, do much more than merely suggest that the doctors could have given some other form of treatment, and then shift the burden onto the defendants to show that their treatment, given according to their reasoned judgment, was the best treatment available for the particular mental illness they were concerned with, or that no other treatment was available. The very nature of treatment for mental illness requires that doctors have great discretion in the different means to be used to treat their patients, especially where immediate and emergency treatment must be given.

No serious operation was ever conducted, nor was drastic treatment given. The only indication along these lines, as appears in the hospital records, is that the plaintiff was injected with certain medication. Under the circumstances the decisions of the doctors to utilize such treatment was well within the area of their competence. She was sick, as the immediate diagnosis showed, and in need of immediate help.

Plaintiff's constitutional rights have not been violated by the defendants.

IV

This Court does not agree with the contention of abstention on the question of the validity of Mental Hygiene Law, § 34(9-a), as argued by the defendants. There is no ambiguity in the language of this Statute which might affect its validity. This Court does have the power initially to

hear questions of constitutionality. *Zwicker* v. *Koota,* 389 U. S. 241 (1967).

Since none of the plaintiff's allegations as to the constitutionality of the Statutes involved are substantial, the complaint as to Mental Hygiene Law, § 34(9-a), fails to state a claim upon which relief can be granted.

This decision is limited to the constitutional claims raised under 42 U.S.C.A. § 1983; no intimation is made as to plaintiff's rights in a common law action for battery against the defendants or their agents under *Schloendorff* v. *Soc. of the New York Hospital,* 211 N. Y. 125, 129-130 (1914). *See also* N. Y. Mental Hygiene Law, § 44 (actions for damages).

The contention of the plaintiff that this action may be maintained as a class action is rejected. Since the question of constitutionality of Mental Hygiene Law, § 34(9-a) is not substantial, the claim must be dismissed. *Ex Parte Poresky, supra.* Thus, there is no need to determine whether this action may be brought as a class action or not. The claim for damages for the injections contrary to plaintiff's religious beliefs and wishes is a claim belonging to plaintiff alone, so that there is no class involved. *Cf.* F.R.C.P. 23(a), (b)(2).

Accordingly, it is

ORDERED that the third cause of action of the complaint is dismissed for failure to state a substantial Federal claim upon which relief could be granted; and it is further

ORDERED that the defendants are entitled to summary judgments against the plaintiff dismissing all other claims of the complaint without costs; and it is further

ORDERED that all other motions in this matter before the Court are denied.

ANTHONY J. TRAVIA,
U.S.D.J.

Dated: Brooklyn, New York, November 21, 1969.

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IN THE

Supreme Court of the United States

September Term, 1971

No. 71-418

ALAN D. MILLER, M.D. as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D. as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D. as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Petitioners,

vs.

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Respondent.

BRIEF FOR THE HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

September Term, 1971

No.

ALAN D. MILLER, M.D. as Commissioner of Mental Hygiene of the State of New York; ALEXANDER THOMAS, M.D. as Director of the Psychiatric Division, Bellevue Hospital Center; FRANCIS J. O'NEILL, M.D. as Director of Central Islip State Hospital; and doctors on the staffs of Bellevue Hospital and Central Islip State Hospital whose names are unknown to plaintiff,

Petitioners,

vs.

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Respondent.

BRIEF FOR THE HOSPITAL ASSOCIATION OF NEW YORK STATE, INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Interest of the Hospital Association of New York State, Inc.

The Hospital Association of New York State, Inc. is an association of voluntary and public hospitals located in the State of New York. A principal objective of the Hospital

Association is to promote the development and maintenance of the highest standards of hospital and health care through high quality and efficient hospital practices and administration. In order to achieve this objective, the Association keeps abreast of legal developments relating to hospitals and interprets these developments for its members. Only in a climate in which hospital administrators and professional personnel are secure in the knowledge of the status of laws relating to their practices, procedures and responsibilities can hospitals most effectively provide the services and care to which the public is entitled.

Accordingly, the Hospital Association of New York State, Inc. has a vital interest in seeking review of the decision of the United States Court of Appeals for the Second Circuit below. If that decision is left undisturbed it will tend to put an umbrella of significant uncertainty on the environment of any hospital in New York State ministering to mental illness. If the uncertainties inherent in the decision below are permitted to stand, there is a real danger that the particular needs of the mentally ill may become subordinated to an understandable desire of hospital staff to avoid disruptive, expensive litigation. An atmosphere permeated with constant concern over the risks of legal action, real or fancied, justified or not, is hardly an atmosphere suited to the providing of high quality health care.

Attorneys for the petitioners and respondent have consented to the filing of this brief. Executed consent forms for this purpose have been filed with the Clerk of the Court in accordance with Rule 42 of this Court.

Statement of the Case

Miriam Winters brought this action against the Commissioner of Mental Hygiene of the State of New York, the Director of the Psychiatric Division, Bellevue Hospital Center and the Director of Central Islip State Hospital. Insofar as is here relevant, she claimed damages resulting from the administration to her of medication during the time she was a patient at Bellevue and later at Central Islip State Hospital. It has been Miss Winters' contention that at all times material she was a practicing Christian Scientist and as such her religion forbade her from receiving any type of medication. In accordance with the procedures set forth in Section 78(1) of the New York Mental Hygiene Law, Miss Winters was involuntarily admitted to Bellevue Hospital Center allegedly suffering from mental illness. Subsequently, and in accordance with Section 72(1) of the Mental Hygiene Law, Miss Winters was committed to Central Islip State Hospital. Miss Winters has never contested the legality or constitutionality of her involuntary commitment to either Bellevue or Central Islip State Hospital. Her argument has been that at both of these institutions medication was administered to her without her consent and over her protest all in violation of her First Amendment right to freedom of religion.

The United States District Court for the Eastern District of New York granted defendants' motion to dismiss the complaint and for summary judgment, holding that plaintiff's right to practice her religion had to be tempered by the public right to be free from any danger of harm which plaintiff might inflict in an unmedicated state. The Court of Appeals for the Second Circuit reversed, holding that in the absence of a judicial determination of incompetence the defendants violated plaintiff's constitutional right to

freedom of religion by forcing her to take medication to which she objected on religious grounds. Judge Moore dissented, writing that in his view the hospitals in question acted properly in order to protect against the infliction of harm by plaintiff either to herself or to others. Judge Moore also dissented vigorously from the finding of the Court, implicit in its decision, that the named defendants, the Commissioner of Mental Health and the two hospital directors, could be held individually liable although there was no evidence that they had any direct knowledge of Miss Winters' case.

Summary of Argument

The decision below raises very significant issues. It is a case of first impression and the courts below have recognized that fact. *Winters* v. *Miller,* 306 F. Supp. 1158, 1167 (E.D.N.Y. 1969). In this brief we argue that the Court of Appeals for the Second Circuit has decided an important question of federal constitutional law which has not been, but should be, settled by this Court since it would, if left undisturbed, cause debilitating confusion in the administration of mental health programs throughout the State of New York. We do not take up the points ably argued by counsel for the petitioners herein except to adopt the views of petitioners and to concur in their arguments as follows: that the decision of the Court of Appeals is a radical departure from decisions of this Court which have permitted curtailment of First Amendment rights where there is a compelling state interest; that the decision of the Court of Appeals drastically conflicts with New York State law and practice in regard to the care of mentally ill citizens; and that money damages against the named defendants are completely inappropriate since there was no showing that

they personally condoned or were even aware of the medication of plaintiff. Nor do we here take up the merits of the controversy between the parties except to state that we anticipate that if the petition is granted we will file a brief covering all the issues to which the writ is directed.

Why the Petition Should be Granted

POINT A

The United States Court of Appeals for the Second Circuit has decided a question of federal constitutional law relating to the rights of inmates of mental institutions which has not been but ought to be settled by this Court rather than by any court below.

This Court frequently has dealt with the problem of balancing an individual's First Amendment rights to freedom of religion against the secular interests of society as a whole. The Court has not, however, spoken to the specific question of whether an individual hospitalized for mental illness can resist medical treatment on religious grounds.

Prior decisions of the Court have held that when an individual's religious practices create even a remote possibility of harm to the public, those practices may properly be prohibited or controlled by government for the common good. In *Prince* v. *Massachusetts,* 321 U.S. 158 (1943) the Court found that the State of Massachusetts had an overriding public interest in the protection of children through the enforcement of child labor laws, albeit in some instances the laws conflicted with the religious tenets of Jehovah's Witnesses. In *Prince,* a Jehovah's Witness claimed a denial of religious liberty when she was convicted for permitting

her minor ward to offer religious tracts for sale on the streets in conformity with her belief from the scriptures: "A child shall lead them." *Id.* at 164. The fact that the threat of danger to the child may have been slight since she was at all times accompanied by an adult was deemed irrelevant by the Court. The appellant argued that state action must fall when it impinges on a claimed religious freedom unless shown to be necessary to protect against "some clear and present danger". *Id* at 167. The Court rejected this argument and held that although the likelihood of injury might be slight, the possibility that the prohibited activity could be injurious was justification for state action.

As early as 1878 the Court wrestled with the difficulties of weighing religious liberties against laws enacted for the organization of society. In *Reynolds* v. *United States,* 98 U.S. 145 (1878) the Court was asked to upset a conviction for bigamy on the grounds that the appellant was a member of the Mormon Church enjoined by his religion to engage in polygamous relationships. The Court rejected his argument.

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices . . .[I]f a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? *Id.* at 166.

Although the Court could point to no immediate or definite harm which would arise from the religiously motivated polygamous union, it was its view that the mere possibility of disruption to the social life of the nation was reason enough to uphold the contested statute.

In *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1904) the issue was whether the State could compel an individual to be vaccinated against his will. The appellant argued that he believed vaccination was harmful and did not prevent the spread of disease. The Court conceded that perhaps the appellant was correct in his belief, but nonetheless disregarded that argument as irrelevant.

> The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adopted to prevent the spread of contagious disease. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. *Id.* at 35.

The petition herein is important because the decision of the Court of Appeals below departs from the reasoning of this line of cases and holds, instead, that the mere possibility of harm to self or to others is insufficient cause to restrict an individual in his religious practices.

In all of those cases cited and in many others[1], the Court has been asked to define the bounds of individual liberties in relation to the state's interest in ordering society for the public good. This Court has seen as its obligation the task of "narrowing the no man's land where this battle has gone on." *Prince* v. *Massachusetts, supra* at 165. We are here asking this Court to again enter the "no man's

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[1]See the decision of the District Court, Judge Travia, and the brief of petitioners herein.

land'' in order to resolve this latest conflict: can a hospital, in caring for an individual suffering from mental illness, administer professionally indicated medication despite the individual's objections to such treatment on religious grounds? The Hospital Association of New York State, Inc. is here to enter its earnest plea with the Court to clarify this issue so that its members may have the knowledge they need to effectively serve the public.

POINT B

The decision of the Court below is ambiguous and unclear in important respects to a degree which will significantly hamper effective administration of mental health care.

Whereas a licensed doctor could once rely on his professional training and judgment to guide him in his decisions on patient care, in light of a growing concern with expensive litigation, he must now also concern himself with how a judge and jury are going to construe his conduct. The decision below creates so many ambiguities, that a lawyer, let alone a doctor, would have difficulty ferreting out a proper course.

As best we can ascertain, the decision of the Court below holds that despite the possibility of injury to a patient or to others and despite concededly proper commitment to an institution for the care of the mentally ill, in the absence of a judicial determination of incompetency, a hospital or physician *may* not be justified in administering medication to a patient against the will of that patient if the patient's objection is based on religious belief. The decision of the Court is unclear, however, in that it leaves open the possibility that involuntary administration of

medication *may* be proper in a case where there is proof that a patient would cause injury if her religious beliefs were respected. Operation of a hospital for the mentally ill with the state of the law left in that quandary will be unnecessarily and perhaps harmfully left uncertain.

Does the decision mean that in some cases of persons found to be mentally ill, but not declared incompetent, medication can be administered despite the objections of the patient? If medication is proper in certain situations, who is to determine when such a situation exists? In this case there was considerable documentation of the patient's history and mental illness, all as set forth in the decision of the District Court. Yet the Court of Appeals found that history insufficient to warrant involuntary medication. How ill must a patient be before a doctor can validly decide that the patient is likely to cause injury if he is not restrained by the use of medication? The Court of Appeals for the Second Circuit sets no test, suggests no criteria, nor does it tell hospitals who should make the decision.

Does the decision mean that a mental patient can successfully resist medication for any reason or only for a religious reason? Always before this Court has held that a religious belief does not excuse otherwise unacceptable practices. See *Reynolds* v. *United States, supra* wherein the Court wrote: "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167.

The Court of Appeals, in emphasizing that Miss Winters was never adjudicated incompetent and that therefore she should not have been medicated against her will, seems to be saying that a patient suffering from mental illness should

have all the prerogatives to refuse treatment that the law recognizes for competent adult patients with physical ailments. The irrationality of that position is thoroughly discussed by Judge Moore in his dissenting opinion below. Moreover, New York, in its Mental Hygiene Law, has stated specifically that persons apparently suffering from mental illness may be hospitalized against their will. The constitutionality of §§72 and 78 of the Mental Hygiene Law, pursuant to which Miss Winters was committed, has never been questioned in this proceeding. Given the responsibility to bring the mentally ill involuntarily into hospitals, there must be the concomitant authority to prevent these patients from injuring themselves or their fellows and to minister to them accordingly. We prefer the reasoning of the District Court below and urge this Court to adopt it:

> In mental illness cases, the public interest in treating and curing patients is greater than the public interest is in cases of physical illness. *Winters* v. *Miller,* 306 F. Supp. 1158, 1167 (E.D.N.Y. 1969).

The Court of Appeals decision relied at least in part on Miss Winters' argument that since she had been a Christian Scientist for many years before her commitment, her decision to reject medical treatment was made before any allegation of mental illness. Does the decision thereby mean that if a hospital knows a patient previously objected to treatment when she was sane, that it must be assumed that she still objects, despite her present mental state? Such a conclusion is ludicrous in the context of an institution for the mentally ill. Surely the Court below is not suggesting that a violent, albeit religious, patient may not be restrained by medication when there is no other reasonable method to prevent her from attacking or harming others, regardless of her religion. Moreover, how is a

mental institution to reliably discern what are the pre-illness beliefs of any patient?

Next the Court of Appeals says that there was no right on the part of defendants to administer medication to Miss Winters because there was no "clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his 'free exercise' rights". Does the decision thereby mean that the physician in charge of the patient must be prepared to prove, in a court of law, that the patient would have done harm to third persons if not restrained by the use of medication? What do the doubts raised by that holding do for the effective operation of hospitals?

The ambiguities raised by the Court of Appeals decision are many. Given the importance of proper care for the mentally ill, and given this Court's previous dedication to the task of narrowing the "no man's land" between legitimate state interest and individual liberty, the Court should settle the questions raised below.

CONCLUSION

The decision of the Court below decides an important question of federal law which has not been but should be settled by this Court. The lower Court decision raises several ambiguities and is in apparent conflict with other decisions of this Court and with present law and practice in the State of New York. The issue is one of manifest legal and practical importance and for all the foregoing reasons should be decided by this Court.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-418

ALAN D. MILLER, M.D., as Commissioner of Mental Hygiene of the State of New York, FRANCIS J. O'NEILL, M.D., as Director of Central Islip State Hospital, and ALEXANDER THOMAS, M.D., as Director of the Psychiatric Division, Bellevue Hospital Center,

Petitioners,

—against—

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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II. This Court should not consider the applicability of the doctrine of *respondeat superior* to the facts of this case because that question is premature, and was not raised, briefed or argued in either of the Courts below 12

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Supreme Court of the United States

OCTOBER TERM, 1971

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MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion below of the United States Court of Appeals for the Second Circuit is now reported at 446 F.2d 65 (1971).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petitions of petitioners Miller and O'Neill (the "State Petition") and of petitioner Thomas (the "City Petition").

Questions Presented

1. Can mental hospitals, acting without judicial authorization, administer non-emergency medications to a Christian Scientist who objects to such treatment on religious grounds?

2. Should this court consider the applicability of the *respondeat superior* doctrine to the facts of this case when that question was not raised, briefed or argued in either of the courts below, and when the resolution of that question may be unnecessary to the disposition of this case?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the petitions.

Statement of the Case

Respondent is a 59 year old Christian Scientist. She has never been convicted or charged with any crime or violent behavior. She has never been found to be mentally ill or mentally incompetent by any court or judge, and except for the incidents at issue, she has never been hospitalized or treated for mental illness. Respondent lived alone, on welfare, managing her person and affairs without assistance, until May of 1968. In mid-April of that year, her long-standing request for a room with a private bath (she had a diuretic problem) was finally granted, and she was taken to a Manhattan hotel by her welfare caseworker. She and her caseworker were led to a shabby room in the rear of the hotel, with no light or view. She protested, and was shown

a much nicer room, in the front of the hotel, which she and her caseworker accepted. The rent was paid for the remainder of April, and respondent lived there, without incident, until May 2, 1968. On that day, her attempt to pay the rent for the month of May was refused, the hotel claiming, for the first time, that the room she was in was for "transients, not for permanents." Respondent refused to move to the rear room she and her caseworker had initially declined, and locked herself in her room. The management called the police and within hours police officers broke through her door and took her directly to Bellevue Psychiatric Hospital where she was admitted under section 78 of the New York Mental Hygiene Law as an "emergency" patient. At Bellevue she was examined for less than a minute by a psychiatrist, who attempted to take her blood pressure. She refused, telling him she was a Christian Scientist, and he left the room. She was then taken to a ward where, over her express religious objection, she was forcibly subjected to an intramuscular injection of Thorazine, a tranquilizing medication, before she was examined by any other psychiatrist. On May 6th, although she had not, in fact, been examined by any doctor, she was notified that she had been examined by two doctors and found by them to be mentally ill. On May 7th, the two doctors did examine her, and certified that in their opinion she was mentally ill—a characterization which respondent vigorously disputes. On May 13th, pursuant to their certificate, respondent was transferred to Central Islip, a state mental hospital, where she remained as an involuntary patient until June 18, 1968. On that date, she was converted to "voluntary" status, and on July 18, 1968, she was discharged to her own custody.

The Central Islip "mental status" report described respondent's orientation, memory, retention and recall, knowledge, and abstraction ability as "good," and her "judgment" as "normal" (Appendix to the Second Circuit, pp. 48a-51a). And yet, for the eleven weeks she was hospitalized at Bellevue and Central Islip, including her final month as a voluntary patient, she was forced daily to take medication, orally or by injection, over her express religious objection, even though those medications were not necessary to preserve her life or safety, and even though she was not a behavior or management problem. The doctors and hospital officials, including petitioners, did not obtain or attempt to obtain judicial authorization for their actions.

Following discharge, respondent filed suit under 42 U.S.C. §1983 seeking declaratory and injunctive relief, and damages. The District Court granted summary judgment for petitioners. The Second Circuit reversed and remanded for trial.[1]

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[1] Although she did not, in the present case, challenge the constitutionality of the statutory procedures under which she was hospitalized, respondent advised the courts below that she had intervened as a plaintiff in the case of *Fhagen* v. *Miller*, 306 F. Supp. 634 (S.D.N.Y. 1969), in which Judge Edward Weinfeld ruled that those procedures raised substantial constitutional questions. A three-judge court was convened, but it abstained, and that case is now pending on appeal in the New York State Court of Appeals.

ARGUMENT

I.

The decision of the Second Circuit is limited to the facts of this case, is not in conflict with the applicable decisions of this Court, and is not of sufficient nationwide importance to justify review.

A. The Decision of the Second Circuit Is Limited to the Facts of This Case.

The decision of the Second Circuit is not at all "radical" (State Petition, p. 5), and is much more limited than petitioners would have this Court believe. In her briefs to the Second Circuit, respondent contended "only that *in the circumstances of this case,* compulsory medication constituted an unjustified abridgement of her religious freedom" (*Brief for Plaintiff-Appellant, p. 15*). Apparently believing the case-by-case method to be the best method for resolving the complicated issues in this previously unlitigated area of the law, the Second Circuit declined "to formulate any *per se* rules," and expressly indicated that its decision was limited to "the facts" of this "particular case" (State Petition, p. 7a).

Petitioners do not claim the Second Circuit adopted an incorrect rule of law, or misconstrued the legal principles to be applied in religious freedom cases. Petitioners agree that religious freedom can be abridged only "where there is a strong and compelling state interest" (State Petition, p. 5), which is the standard adopted by both the District Court (State Petition, pp. 37a and 42a), and the Circuit

Court (State Petition, pp. 7a-8a). Petitioners' quarrel, therefore, is not with the legal standard adopted by the Second Circuit, but with the application of that legal standard to the particular facts of this case.

B. The Decision of the Second Circuit Is Not in Conflict With Applicable Decisions of This Court.

Petitioners Miller and O'Neill contend that the decision below "is a radical and unwarranted departure" from the "long-standing principle" that "limitations on the free exercise of religion are justifiable where there is a strong and compelling state interest" (State Petition, p. 5). Petitioner Thomas contends that the decision below is "essentially inconsistent" with *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905) (City Petition, p. 7). Even if correct, those contentions would not establish a direct "conflict" with applicable decisions of this Court within the meaning of Rule 19(1) (b) of the Rules of this Court. *E.g.,* Stern & Gressman, *Supreme Court Practice* (4th ed., 1969), pp. 158-159. Furthermore, those contentions are not correct.

Several "principles" emerge from the prior decisions of this Court. Religious freedom is a "preferred" freedom, *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943), which can be abridged "only to prevent grave and immediate danger," *Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943), to a "compelling state interest," *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963). And even then, the state must affirmatively show that the state interest cannot be achieved by less drastic alternatives. *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963). See also, *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).

1. *Preferred Freedom*

Respondent's religious objection to medication was not accorded "preferred" status. It was simply ignored, exactly as if it had been a non-religious objection.

2. *Grave and Immediate Danger*

The administration of tranquilizing medication was not necessary to prevent grave and immediate danger to respondent. Her life was not in jeopardy, and the only "danger" of withholding medication was that she might be somewhat more vociferous in protesting her involuntary hospitalization than she would be if drugged. Nor was there grave and immediate danger to the state. Even upon admission, respondent was, though protesting, "in no acute distress" (State Petition, p. 26a). She was "not a discipline problem" (State Petition, p. 27a), and there is absolutely no evidence, or even claim, that she had injured, or threatened to injure, the other patients, or the staff.

But even if there had been, at the outset, an "emergency" which justified petitioners in doing what *they* thought best for respondent, surely at some point during respondent's eleven weeks of hospitalization, petitioners could have found the time to request judicial authorization for their continuing disregard of respondent's religious objection to medication. Although challenged in the District and Circuit courts to do so, petitioners have not been able to cite one case which, absent a life or death emergency, authorized involuntary medical treatment without prior judicial approval.

3. *Compelling State Interest*

The only state interest urged by petitioners is the state's interest in restoring the mentally ill to mental health, thus

relieving the state of "burden and expense" (State Petition, p. 7). In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court ruled that "burden and expense" is not a sufficiently compelling state interest to justify abridgment of religious freedom, at least where there are less drastic alternatives (see discussion *infra*).[2]

Of course, petitioners could simply have discharged respondent, thus avoiding any burden or expense. Certainly they could have done so during the final month of her hospitalization, when she was a "voluntary" patient and thus presumed capable of deciding whether she should remain in the hospital.[3] Furthermore, on June 29, 1968, almost three weeks before respondent's discharge, petitioner O'Neill informed the Welfare Department that respondent "has been approved for release from this hospital on convalescent care in her own custody" (Appendix to the Second Circuit, p. 63a). And yet, on that day,

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[2] See also, *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963), *vacated and remanded*, 375 U.S. 14 (1963), *on remand*, 125 N.W. 2d 588 (1963). And *State* v. *Yoder*, 49 Wisc. 2d 430, 182 N.W. 2d 539 (1971). And see, *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969), and *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970), both ruling that increased public expense does not justify abridgment of important constitutional rights.

[3] According to respondent's uncontradicted affidavit, "At Central Islip I was told that unless I agreed to stay as a voluntary patient, I would be held as an involuntary patient for at least six months. It is for that reason, and that reason alone, that I finally agreed to stay as a 'voluntary patient'" (Appendix to Second Circuit, p. 40a). Thus, her status was not truly "voluntary." Still, under N.Y. Mental Hygiene Law §71(5), by converting her to voluntary status, petitioners were certifying that she was "suitable" for voluntary status, which means she was capable of determining, on her own, whether to accept or reject hospitalization. Having signed in as a "voluntary," however, respondent was not free to leave the hospital, unless petitioners consented, for at least 25 days. N.Y. Mental Hgyiene Law §71(1).

and every day thereafter, long after the supposed state interest had been achieved, respondent was forced to accept medication, over her continuing protests, even though petitioners themselves believed her well enough to leave.

Finally, the Second Circuit found there was "no evidence in the record that . . . the state was in any way protecting the interest of society or even any third party" (State Petition, p. 9a), and petitioners suggest no reason for this Court to review that finding of fact.

4. *Less Drastic Alternatives*

Respondent did not object to non-physical treatments such as group therapy, individual psychotherapy or psychoanalysis, occupational therapy, recreational therapy, or the like. Petitioners have never even claimed, much less proved, that one or more of those alternatives would not have sufficed to cure respondent's alleged mental illness. Accordingly, their actions were unconstitutional. *E.g.*, *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963); *Covington* v. *Harris,* 419 F.2d 617 (D.C. Cir. 1969); and *Lake* v. *Cameron,* 364 F.2d 657 (D.C. Cir. 1966).

With these principles in mind, it is apparent that there is no conflict between the decision below and the applicable decisions of this Court. *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158 (1944); *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905), and *Reynolds* v. *United States,* 98 U.S. 145 (1878), have all been specifically limited by this Court to situations involving "conduct or action" which "invariably posed some substantial threat to public safety, peace or order." *Sherbert* v. *Verner,* 374 U.S. 398, 403 (1963). And the absence of a life or death emergency

distinguishes this case from *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1007 (D.C. Cir.), *reh. den.*, 311 F.2d 1010, *cert. den.*, 377 U.S. 978 (1964).

C. The Decision of the Second Circuit Is Not of Sufficient Nation-Wide Importance to Justify Review.[4]

Petitioners contend that "the decision below if allowed to stand, would wreak havoc with the methods of care and treatment of mentally ill citizens which are presently utilized throughout the United States today" (State Petition, p. 8). It is difficult to see how that could be so.

In the United States in 1967, approximately 600,000 mental patients resided in 1142 psychiatric facilities.[5] Given that enormous number of patients, it is inconceivable that the number of hospitalized Christian Scientists could ever be large enough in relation to the total to cause concern, much less administrative chaos. And respondent knows of no class of persons, other than Christian Scientists, who could claim the protections of the decision below. Jehovah's Witnesses, for example, object to blood transfusions, on religious grounds, but not to medication, surgery, or other medical treatments. Accordingly, the decision of the Second Circuit, even if followed in every other circuit, could not conceivably cause wide-spread havoc.

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[4] That this issue has never been raised in any other state or federal court, indicates, of itself, that it is not an issue of nation-wide and recurring importance.

[5] New York Times Encyclopedia Almanac, 1970, p. 515.

Furthermore, at least eight states[6] have already, by statute, granted mental patients who believe in healing by prayer, rights equal to, or greater than, those recognized by the decision below. Missouri, which is typical, provides that "no person who is being treated by prayer in the practice of the religion of any church which teaches reliance on spiritual means alone for healing," may be involuntarily hospitalized unless a "court" finds "substantial evidence" that the person "is or would likely become dangerous to himself, or to the person or property of others." Vernon's Ann. Mo. Stat., §202.807(7) (Supp. 1970).[7] Even if such persons are "dangerous" and can therefore be hospitalized, the statute provides that the hospitalization provisions "do not authorize any form of compulsory medical treatment" (*id.*).[8] At least two more states have statutes which, though more ambiguous, expressly protect religious freedom for mental patients, including, arguably, the freedom to refuse medication.[9] And there may be other states which, by regulation, have respected the patient's right to refuse medication on religious grounds. Respondent knows of no state which, by statute or regulation, expressly authorizes forced medication of a mental patient who objects on religious grounds. In these circumstances, it cannot be said that the

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[6] California, Idaho, Kansas, Michigan, Missouri, New Jersey, North Dakota, and Vermont.

[7] See also, to the same effect, Kan. Stat. Ann. §59-2902 (Supp. 1970); Cal. Welfare & Inst'ns. Code, §6300.1 (Supp. 1971); Mich. Comp. Laws, §330.19 (Supp. 1971); Idaho Code Ann. §66-329(j) (Supp. 1969); N.D. Cent. Code §25-03-11(7) (Supp. 1971); and Vt. Stat. Ann., Title 18, §7507 (1968).

[8] See also, to the same effect, N.J. Stat. Ann. §30:4-7.6 (Supp. 1971); Cal. Welfare & Inst'ns. Code, §7104 (Supp. 1971).

[9] *E.g.*, Minn. Stat. Ann. §253A.17(6) (1971); and Pa. Stat. Ann., Title 50, §4423(2) (1969).

decision below is of such general concern as to justify review by this Court.

II.

This Court should not consider the applicability of the doctrine of *respondeat superior* to the facts of this case because that question is premature, and was not raised, briefed or argued in either of the Courts below.

Respondent expects to prove at trial that petitioners either directed the acts of which she complains, or had knowledge of those acts and did nothing to prevent them, thus making it unnecessary to decide whether, absent such proof, petitioners could be held liable in damages on a *respondeat superior* theory. That proof, of course, is not before this Court. Petitioners have not yet answered the complaint and respondent has not yet taken depositions or propounded interrogatories. Petitioners did submit affidavits in support of their motions to dismiss, but those affidavits do not claim that petitioners had no personal knowledge of the acts complained of herein. And even from the present undeveloped record, it is evident that one of the petitioners, at least, did have personal knowledge. On June 29, 1968, almost three weeks before respondent was discharged, petitioner O'Neill wrote a letter to the Welfare Department in which he acknowledged that "being a Christian Scientist, medication is against her [respondent's] religious practices" (Appendix to the Second Circuit, pp. 63a-66a). But the medication continued (State Petition, p. 25a).

For the remainder of this point, however, it will be assumed that one or more of the petitioners would be

liable, if at all, only if the doctrine of *respondeat superior* is applicable to the facts of this case. That is a question which was not raised, briefed or argued in either of the courts below, and was referred to for the first time in the dissenting opinion of Judge Moore (State Petition, pp. 14a-15a).

In the District Court, petitioners filed two separate motions to dismiss the complaint. In the memorandum supporting his motion, petitioner Thomas contended only that this was not a proper class action (Point I) and that Thomas was "immune" from suit because he was "an intricate part of the municipality" (Point II). In their memorandum, petitioners Miller and O'Neill contended only that the action was "moot" (Point I), that the District Court should abstain (Point II), that the treatment administered to respondent "was not a constitutional violation" (Point III), that the hospitalization procedures were constitutional (Point IV), and that fingerprinting and photographing of mental patients was constitutional (Point V). In a reply memorandum, petitioners Miller and O'Neill agreed with petitioner Thomas that the action was moot.[10] It is not surprising, therefore, that the District Court said nothing at all about *respondeat superior* or vicarious liability. Nowhere in the briefs to the Circuit Court was there any reference to the issue petitioners now ask this Court to review. "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362 note 16 (1958). See

[10] In a letter to the District Court dated October 30, 1969, Assistant Attorney General Joel H. Sachs did state, without citation or elaboration: "As regards plaintiff's claim for damages, such claim, if sustainable, can only be filed in the Court of Claims of the State of New York."

also, to the same effect, *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147 note 2 (1970); *Husty* v. *United States,* 282 U.S. 694, 701-702 (1931); *Duignan* v. *United States,* 274 U.S. 195, 200 (1927); and the numerous cases cited in the *United States Supreme Court Digest,* Appeal and Error, §1104. Where, as here, the issue is premature and may be academic, and where, as here, the petitioners can raise that issue, if it becomes relevant or necessary, in the trial court, and later on appeal, there is no need, or even justification, for departing from this Court's long-standing rule.

Finally, it must be admitted that the applicability of the doctrine of *respondeat superior* in §1983 cases is, indeed, an important question, and one that should not be resolved on the basis of the inadequate record now before this Court. Without attempting fully to brief that issue on the merits, it can be noted that there are strong indications in the decisions of this and other federal courts that the doctrine does apply in §1983 cases.

In *Adickes* v. *Kress & Co.,* 398 U.S. 144 (1970), the plaintiff alleged that employees of a Kress restaurant refused to serve her, a white teacher, because she was accompanied by six black students. She brought suit under §1983, but not against the employees. Rather, she sued only Kress, the corporation, which would be liable, if at all, only on a *respondeat superior* theory. The majority of this Court, although remanding for trial, expressly declined to consider "the relief that might be appropriate," the "remedial issues," and "whether there are any defenses available to defendants in §1983 actions like the one at hand" (398 U.S. at 174 note 44). Thus, the question is at least open, and it would seem implicit in the majority's decision that

the teacher's attempt to impose vicarious liability on Kress was certainly not frivolous and might well be authorized under §1983. Mr. Justice Brennan would have gone further. In a separate opinion, he considered "the kinds of relief" which might be available in §1983 cases (398 U.S. at 231-234), pointing out that "[p]roof of an evil motive of a specific intent to deprive a person of a constitutional right is generally not required under §1983" (398 U.S. at 232). And it is not even necessary that the defendant be shown to have actual knowledge of the violation if he "acted with reckless disregard" (398 U.S. at 233). Mr. Justice Brennan stressed that §1983 "was enacted by a Congress determined to stamp out widespread violations of constitutional rights at virtually any cost, and which imposed liability even on persons who simply failed to prevent certain violations" (398 U.S. at 234).[11]

And in *Nesmith* v. *Alford*, 318 F.2d 110 (5th Cir. 1963), *cert. den. sub nom. Sullivan* v. *Nesmith*, 375 U.S. 975 (1964), the court ruled, in a §1983 case, that "civil liability for money damages of the respective Defendants would depend on traditional tort principles. Each such action will have to be brought home to each Defendant or imputed to him constructively. . . . showing personal action or that imputed by conspiracy, agency, partnership, *respondeat superior*, or the like" (318 F.2d at 125-126) (emphasis added).

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[11] See also, *Roberts* v. *Williams*, —— F.2d —— (5th Cir. 1971), 39 U.S.L.W. 2590, in which the court upheld a §1983 damage action against a prison warden who, through "callous indifference . . . at the management level, in the sustained knowing maintenance of bad practices and customs" permitted an untrained "trusty guard" to carry a shotgun, which was negligently discharged to the injury of the plaintiff.

Given the importance of this question, it should not be resolved on the basis of an incomplete record, particularly where, as here, the named defendants may well be found to be personally liable, thus making it unnecessary even to consider the applicability of the doctrine of *respondeat superior* in a §1983 action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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